85-550

Supreme Court, U.S.
FILED
SEP 30 1985
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SARAH M. SPAETH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 30, 1985

QUESTION PRESENTED

Whether a party may be penalized through an award of punitive damages in a tort action for participating in a state administrative proceeding, where such participation is not shown to be engaged in for some purpose other than prevailing on the merits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85——

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SARAH M. SPAETH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Union Oil Company of California ("Union") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.[1]

OPINIONS BELOW

The opinions of the court of appeals (App. A and App. B) are reported at 762 F.2d 865 and 710 F.2d 1455, respectively; the orders and opinions of the district court (App. C and App. D) are unreported.

JURISDICTION

The judgment of the court of appeals was entered May 24, 1985. Petitioner timely requested rehearing and sug-

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[1] The parties below were plaintiff Sarah M. Spaeth and defendant Union. Union is a wholly-owned subsidiary of Unocal Corp. The only affiliate of Union not wholly owned either by Union or by Unocal Corp. is Magma Power Co., a Nevada corporation.

gested rehearing *en banc* to the court of appeals, which denied both in an order dated July 2, 1985 (App. E), making the petition for certiorari due on September 30, 1985. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1) (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Oklahoma Statutes Annotated, Title 23 § 9 (1955) provides:

> "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

STATEMENT

Introduction

Respondent Sarah M. Spaeth owns one-half of the mineral rights in a tract of land in Blaine County, Oklahoma. In 1956, respondent's predecessor in interest executed a

lease giving Union the right to explore for oil and gas on the property and to produce such oil and gas as it found. After initial exploration revealed significant gas reserves in the area of respondent's property, Union in 1965 sought and obtained a spacing order authorizing it to drill a series of wells, including a single well on respondent's property. Under Oklahoma state law, no operator may drill more than one well per spacing unit without authorization from the state Corporation Commission.[2]

Pursuant to the spacing order, Union drilled a well on respondent's property which, since 1967, has produced gas in paying quantities, resulting in royalties for respondent and other owners of the mineral rights in the land. In 1976, however, respondent decided that she would benefit if Union were to drill a second well on her property. Accordingly, on January 29, 1976, respondent petitioned the Corporation Commission requesting that the spacing order be modified to permit the drilling of a second well on her land.[3] Thereafter, on October 25, 1976, respondent wrote to petitioner Union requesting that a second well be drilled. Union responded negatively to respondent's request, in part because the low price of gas would not justify the cost of drilling a second well and in part because the outstanding spacing order of the Corporation Commission (then being challenged by respondent) would not permit it.

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[2] Okla. Stat. Ann., Title 52 § 87.1(a) (1969).

[3] This was not the first time that such a request had been made with respect to respondent's property. In 1975 a third party working with respondent made a similar petition to the Commission. That application was withdrawn after the Commission's trial examiner recommended after a hearing that the application be denied. Report of the Commission to Permit Additional Well to Be Drilled Within Established Morrow Spacing Unit, Cause CD No. 40701, Order No. 113411 (Corp. Comm'n Okla. June 12, 1975).

At the hearing on respondent's application on May 7, 1976, Union and other lessees in the area appeared in opposition, arguing that respondent had put forward no new evidence that would justify revision of the Commission's 1965 order. On June 22, 1976, the Commission issued its Findings and Order agreeing with Union and denying the application. App. F.

Respondent appealed the June 1976 order of the Commission to the Oklahoma Supreme Court. Once again Union appeared through counsel, arguing that the Commission had correctly concluded that respondent failed to make an adequate factual showing that the 1965 spacing order should be revised. On May 8, 1979, the Oklahoma Supreme Court reversed the Corporation Commission, finding that respondent, as the only party presenting evidence at the June 22, 1976 hearing, had carried her burden of showing that circumstances had changed sufficiently to justify increasing the number of authorized wells on respondent's property to two. App. G. After Union had unsuccessfully sought to reopen the proceedings on remand to the Commission for the taking of additional evidence, the Corporation Commission issued the new order on December 20, 1979. Union, having meanwhile negotiated a higher price from its gas purchaser, promptly offered to drill a second well. Respondent declined this offer, however, preferring to pursue her legal and equitable remedies as described below.

Proceedings Below

Shortly before the Oklahoma Supreme Court issued its decision overruling the Corporation Commission, respondent had begun an action in Oklahoma state court against Union seeking actual and punitive damages, as well as cancellation of her lease with Union, for what she claimed was Union's breach of an implied covenant to protect her land from drainage by drilling an additional well. This action was subsequently removed to federal district court because of diversity of citizenship.

At the trial in 1981 respondent sought some $25 million in punitive damages under the Oklahoma statute providing for punitive damages in non-contract cases where there is shown to have been "oppression, fraud or malice, actual or presumed." [4] In making the claim for punitive damages, counsel for respondent relied on Union's opposition before the Commission and the Oklahoma Supreme Court and specifically characterized as "malicious" Union's request for a further hearing before the Commission after the case had been remanded by the Supreme Court.[5] Over Union's objections, the trial court allowed the jury to consider respondent's claim for punitive damages even though no evidence had been submitted to show that Union's position before the Commission and the Oklahoma Supreme Court had no basis in fact or was taken for the purpose of harassing respondent.

After very brief deliberation, the jury returned a verdict for respondent awarding $22,807.00 in actual damages and $3 million in punitive damages. Less than a week thereafter, the court ordered Union's lease with respondent cancelled except as to the portion that had been developed through the drilling of the single well originally authorized by the Corporation Commission. Union immediately moved for a judgment notwithstanding the verdict asserting, among other things, that the issue of punitive damages should not have been submitted to the jury because Union "may not now be penalized for its efforts to lawfully pursue its legal remedies before the Corporation Commission." [6] The district court denied Union's motion.

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[4] Okla. Stat. Ann., Title 23 § 9 (1955).

[5] Transcript of Proceedings held on March 9 through March 11, 1981 at 543-44, *Spaeth v. Union Oil Co.*, No. C-79-345-T (W.D. Okla. Mar. 11, 1981).

[6] Brief of Union Oil Company of California in Support of Motion for Judgment N.O.V., or in the Alternative, a New Trial at 13, *Spaeth v. Union Oil Co.*, No. Civ. 79-345-T (W.D. Okla. Apr. 2, 1981).

On appeal to the Court of Appeals for the Tenth Circuit, Union argued once again that the only basis for the award of punitive damages was Union's participation in the Corporation Commission proceedings and the subsequent appeal and that such an exercise of constitutional rights "simply cannot be the basis of punitive damages" consistent with due process.[7] Although Union did not expressly refer to the First Amendment in presenting its appeal to the court of appeals, Union's invocation of the due process clause necessarily implicated the panoply of First Amendment rights subsumed under the due process clause of the Fourteenth Amendment and made applicable to the States thereby.[8] The court of appeals affirmed the trial court's judgment as to Union's liability, but remanded the case for a reduction of the actual and punitive damage awards. App. B. In its opinion the court of appeals did not address Union's argument that the award of any punitive damages in this case was in violation of Union's constitutional right to appear before the Corporation Commission and the Oklahoma Supreme Court.

On remittitur, the actual damage award was reduced to $17,542 and the plaintiff remitted $1 million of the $3

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[7] Brief of Appellant at 23, *Spaeth v. Union Oil Co.*, No. 81-1752 (10th Cir. Nov. 19, 1981); *see also id.*, at 10-11, 23-26; Reply Brief of Appellant at 18, *Spaeth v. Union Oil Co.*, No. 81-1752 (10th Cir. Feb. 16, 1982) ("To allow punitive damages to be assessed against UNION for UNION's pursuit of its legal remedies would be to deprive UNION, not only of the remedies themselves, but of the due process of law afforded by the Constitutions of the State of Oklahoma and the United States. UNION cannot be held liable for lawfully pursuing its legal remedies" (citations omitted)).

[8] *See* n. 12, p. 8, *infra*. Union's other arguments on appeal concerned Oklahoma state law concerning the covenant to prevent drainage, the role of the Corporation Commission in authorizing the drilling of new wells, the scope of the Oklahoma punitive damages statute, the propriety of the jury instructions, the lack of any pecuniary loss by respondent, and the excessiveness of the punitive damages awarded. Although Union believes that the court of appeals was in error on each of these issues (save the last), it does not seek this Court's review on any of these matters.

million in punitive damages. App. C. Union once again appealed to the Tenth Circuit, this time on the issue of punitive damages alone. On this second appeal, Union once again asserted that the award of punitive damages against Union for the exercise of its constitutional right to appear before the Corporation Commission was improper.[9] Once again the court of appeals issued an opinion, this time affirming the punitive damages award, without even discussing Union's constitutional argument.[10]

Union's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals on July 2, 1985, without opinion. App. E.

REASONS FOR GRANTING THE WRIT

The right given by the First Amendment to petition state and federal government officials is an important part of our heritage. Apart from the limited area of defamation, however, this Court has yet to decide the extent to which the constitutional right of petition limits the applicability of state tort law. Furthermore, the number of decisions of lower federal and state courts reconciling such tort law with the right to petition indicates the frequency with which this issue arises. Although generally the courts have upheld the constitutional right and refused to apply the state tort law, the result in this case shows that this is not always the case. The failure of the court below to recognize the right-

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[9] Brief of Appellant at 16, *Spaeth v. Union Oil Co.*, No. 84-1766 (10th Cir. Aug. 14, 1984) ("UNION is . . . being punished for its exercise of its right to due process—the right to appear before the Corporation Commission and express its position regarding the prevention of waste and the protection of correlative rights").

[10] App. A. The court of appeals did, however, make clear that the fact of Union's participation in the Commission proceedings was a substantial factor in the award of punitive damages. *Id.* at 4a ("The defendant's conduct in maliciously allowing drainage of plaintiff's gas and in opposing her attempts to obtain relief [from the Commission] . . . must be considered" in upholding the punitive damage award of $2 million.)

of-petition issue and to apply the teachings of this Court regarding that right warrant review. Certiorari should be granted to establish the constitutional limits on the extent to which state tort law can be used to punish persons for their participation in judicial or administrative proceedings.

The First Amendment to the United States Constitution by its terms guarantees "the right of the people . . . to petition the government for a redress of grievances." As this Court recently has observed, "the values in the right of petition as an important aspect of self-government are beyond question." [11] The right is therefore applicable to the states by incorporation through the Fourteenth Amendment's guarantee of due process.[12] And it extends to corporations, as well as to individuals.[13]

There are a number of circumstances in which state law can impinge upon the activities of an individual or corporation in petitioning the government. The issue can arise, for example, when one party sues another under state law of malicious prosecution for the defendant's suing the plaintiff.[14] It has arisen in a variety of cases

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[11] *McDonald v. Smith*, 105 S. Ct. 2787, 2790 (1985).

[12] *See DeJonge v. Oregon*, 299 U.S. 353 (1937); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939). In addition, the guarantee to each citizen of the "privileges and immunities" associated with United States citizenship has been construed since the earliest days of the Fourteenth Amendment to bar any state from interfering with a person's right to petition for redress of grievances. *See Twining v. New Jersey*, 211 U.S. 78 (1908); *United States v. Cruikshank*, 92 U.S. 542 (1875).

[13] *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778-86 (1978).

[14] *See City of Long Beach v. Bozek*, 183 Cal. Rptr. 86, 645 P.2d 137 (1982) (action for malicious prosecution arising from defendant's unsuccessful suit against city and two officers for false imprisonment); *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983) (injunction against malicious prosecution action brought by state attorney unsuccessfully sued for negligence in failing to protect deceased wife from her husband); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982) (malicious prosecution action

where the gravamen of the charge under state law has been tortious interference with some business relationship.[15] Parties have invoked the First Amendment protection of their right to petition when faced with proceedings under state unfair competition laws.[16] And, as in the present case, the issue can arise when one party seeks punitive damages under state tort law based upon the "aggravating circumstance" of the defendant's exercise of its right to petition for redress to state or federal authorities.[17]

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arising from defendant's unsuccessful prosecution of suit for theft of trade secrets); *Matossian v. Fahmie*, 101 Cal. App. 3d 128, 161 Cal. Rptr. 532 (1980) (malicious prosecution action brought by liquor licensee against other licensee for trying to influence public officials not to renew plaintiff's license).

[15] *See, e.g., Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980) (defendants petitioned the city's board of directors to rezone a particular site to prevent plaintiffs from constructing a highrise apartment complex on that site); *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972) (defendants sought to persuade the government to abandon its intention to permit logging in a particular wilderness area despite a contract allowing plaintiff to harvest in that area); *Mayer v. Wedgewood Neighborhood Coalition*, 707 F.2d 1020 (9th Cir. 1983) (defendants opposed construction of rental housing by plaintiff in several administrative proceedings); *Aknin v. Phillips*, 404 F. Supp. 1150 (S.D.N.Y. 1975) (defendants allegedly conspired to close down plaintiff's discotheque); *Sawmill Products, Inc. v. Town of Cicero*, 477 F. Supp. 636 (N.D. Ill. 1979) (defendants tried to prevent licensing of plaintiff's sawmill); *Arlington Heights Nat'l Bank v. Arlington Heights Federal Savings and Loan Ass'n*, 37 Ill. 2d 546, 229 N.E. 2d 514 (1967) (defendants allegedly induced village to breach its contract with plaintiff for vacation of a street); *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F. Supp. 514 (D. Minn. 1979) (defendant lobbied for the passage of the Minnesota Bank Credit Card Act which caused damage to plaintiff).

[16] *Suburban Restoration Co. v. ACMAT Corp.*, 700 F.2d 98 (2d Cir. 1983).

[17] *See, e.g., Grybauskas v. Associated Estates Corp.*, 367 N.E.2d 881 (Ohio Ct. App. 1976) (punitive damages awarded for, among other things, filing of legal action simply for purpose of "annoying and harassing").

Despite the number and variety of circumstances in which First Amendment rights may come into conflict with state law, this Court has addressed the question thus far principally with respect to state law of defamation. Most often, of course, it has been the right of freedom of speech and press that has come into conflict with state dafamation laws.[18] But last term in *McDonald v. Smith*, the Court dealt with a case in which the allegation was that it violated a party's right to petition under the First Amendment to hold him liable for making factual representations to the President of the United States. The particular question presented for the Court's decision was not whether the First Amendment protection of the right to petition limited the scope of state defamation law. The Court assumed that it did, invoking, among other things, its prior, related decisions with respect to defamation under the First Amendment protection of speech and press. Rather, the question for the Court in *McDonald v. Smith* was whether state law could punish a petitioner for defamation in connection with a petition to the President even if the petition contained factual assertions that the petitioner knew to be false. The Court ruled that, rather than an absolute privilege, the right to petition (like the protection for freedom of speech and press) protected only statements not knowingly or recklessly false.

Given the Court's concentration on the area of defamation, it should not be surprising that state and lower federal courts sometimes fail to appreciate the constitutional limitations that the right to petition places on state law in other areas, such as malicious prosecution or the award of punitive damages.[19] Indeed, the very con-

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[18] *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[19] In *Gertz*, of course, the Court considered the question of punitive damages in the libel context and concluded that "actual malice" in the sense of knowledge of falsity or reckless disregard of truth

stitutional standards articulated by the Court with respect to state law of defamation make it unlikely that lower courts will apply these decisions in other contexts. Asking whether a speaker has shown a reckless disregard for the truth of his statements, while perfectly sensible when the question is one of whether the right of free speech has been abused, will often have little or no value when the question is abuse of the right of petition. Thus, in the present case respondent has not suggested that Union said anything false to the Corporation Commission or the Oklahoma Supreme Court; respondent's claimed grievance, rather, is that Union participated in the proceedings at all.

To find the relevant analytical framework for determining what respondent would have to prove to have Union penalized for exercising its right to petition, one must leave this Court's First Amendment decisions concerning state defamation law and turn to decisions interpreting federal statutes in the light of the right to petition. Thus, under the Sherman Act the Court has developed the doctrine that a defendant can be held liable only with respect to participation in judicial, administrative, or legislative proceedings that constitutes a mere "sham." [20] Similarly, the Court recently ruled that the National Labor Relations Board could not order an employer to cease

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or falsity was required where the speech involved issues of public concern. *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 347. Last Term the Court ruled that actual malice would not be required for punitive damages in a libel case involving neither a public figure nor speech concerning issues of public concern, with three Justices joining a plurality opinion saying less constitutional protection should be given to such speech and two Justices joining in the judgment because of their view that *Gertz* should be overruled. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 105 S.Ct. 2939 (1985).

[20] *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

its legal action pending in state court absent a showing that the action is not "well founded." [21] Although these decisions technically have been based upon an interpretation of the federal statute involved, each has expressly resulted from the Court's concern for the First Amendment protection of the right to petition.

Perhaps because of the different context in which the question was raised, the court of appeals utterly failed here to appreciate or deal with the need to reconcile Union's constitutional right to petition with respondent's reliance on Union's exercise of that right to establish malice justifying the award of punitive damages. Thus, the court below did not consider whether Union's opposition to respondent's request for administrative action was "well-founded" or was a "sham," or even whether Union knowingly or recklessly made false factual representations to the State Corporation Commission. Nor could there have been any finding adverse to Union on these issues, inasmuch as it actually prevailed initially before the Commission and did so through cross-examination of respondent's witnesses concerning the need for additional wells to be drilled on respondent's property.

The willingness of courts to attach liability to the constitutional right of parties to appear in judicial and administrative proceedings unquestionably harms a party such as Union here by invading its substantial interest in freely presenting its views to the government bodies to whose jurisdiction it is subject. That is particularly the case here where Union had not initiated the proceeding but was simply exercising its right to participate in the proceeding begun by respondent. The true magnitude of the harm, however, goes far beyond this particular case or the parties involved. Putting parties such as Union to the difficult choice of either saying what they think in administrative and judicial proceedings and risking pun-

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[21] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

ishment, or else keeping quiet and remaining safe, will necessarily harm the free marketplace of ideas safeguarded by the First Amendment. If parties are not free to express their positions without threat of harm, not only will the protection of the First Amendment be compromised, but the judgments of the tribunals involved will be based on inaccurate and incomplete information. Only by ensuring immunity from punishment, except where parties act for purposes other than prevailing on the merits, can the courts protect the interest of us all, litigants and the public alike, in promoting fair, accurate, and informed adjudication of matters pending before judicial and administrative tribunals.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted to clarify the First Amendment limitations on state tort laws as applied to activities before judicial and administrative tribunals.

Respectfully submitted,

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September 30, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-1766

SARAH M. SPAETH,
Plaintiff-Appellee,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Defendant-Appellant.

May 24, 1985

H.B. Watson, Jr. (Richard K. Books and Sharon L. Taylor, with him on briefs), all of Watson & McKenzie, Oklahoma City, Okl., for defendant-appellant.

Robert J. Emery, Oklahoma City, Okl. (James M. Gaitis of Emery McCandless & Gaitis, P.C. and Harry H. Selph, II and Stephen R. Stephens of Feliers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Okl., with him on briefs), for plaintiff-appellee.

Before McKAY, BREITENSTEIN and McWILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This case is before the court for the second time. See *Spaeth v. Union Oil Company of California*, 10 Cir., 710 F.2d 1455. The only question raised on the appeal is the amount of punitive damages. On the first appeal we held

that the plaintiff-appellee, Spaeth, was entitled to recover punitive damages. Id. at 1460. This is the law of the case. *Major v. Benton*, 10 Cir., 647 F.2d 110, 112. The jury had awarded $3,000,000.00 in punitive damages and actual damages of $22,807.00. *Spaeth*, supra, 710 F.2d at 1458. We said that "the punitive award shocks our collective judicial conscience." Id. at 1460, and remanded the case saying, Id.:

> "In the exercise of our power under 28 U.S.C. § 2106, we remand the case to the district court with directions (1) to enter a judgment for the plaintiff and against the defendant in the amount of $17,542 for actual damages, (2) to set aside and vacate the award of punitive damages, (3) to order a remittitur of a substantial amount in punitive damages with due consideration to the amount needed to punish the defendant in the particular circumstances presented, and (4) if the plaintiff does not accept the remittitur, to hold a jury trial solely on the amount of punitive damages."

On remand, the trial court said, R. Vol. IX, pp. 612-613:

> "The Court has considered the record presented at trial, including the relative economic positions possessed by the plaintiff and the defendant, the fact that the plaintiff was assisted in this litigation by another, the fact that the defendant asserted as a defense that it held a 'license to drain gas,' (Opinion of the Circuit Court, p. 6), the fact that the defendant offered no explanation prior to the commencement of this action for its failure to fully develop the leasehold estate held by it, and the fact that the defendant's leasehold estate has been cancelled in part and it is now subject to an award of punitive damages. Upon consideration of these factors, and the record as a whole, this Court finds that the defendant's actions towards the plaintiff were particu-

> larly egregious and a substantial award of punitive damages is warranted so as to impress upon the defendant a responsibility to deal fairly with its royalty interest holders. Accordingly, the plaintiff is hereby directed to remit one million dollars of the punitive damages awarded by the jury within fifteen days hereof."

The record sustains the findings of the trial court.

The plaintiff remitted One Million Dollars. R. Vol. IX, p. 614. Judgment was entered for an award of Two Million Dollars as punitive damages. R. Vol. IX, p. 619.

The court found that the defendant's net worth as of September 30, 1980, as shown by its Form 10-Q filed on November 13, 1980, with the Securities and Exchange Commission was approximately three and one-third billion dollars. R. Vol. II, p. 292.

The Oklahoma statute on punitive damages, 23 O.S. § 9, provides:

> "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

The underlying purpose of the statute is to set an example and to punish the defendant for the general benefit of the public. *Garland Coal & Mining Company v. Few*, 10 Cir., 267 F.2d 785, 790; *Thiry v. Armstrong World Industries*, Okl., 661 P.2d 515, 517. Punitive damages need bear no relation to the actual damages awarded, but they must bear some relation to the injuries inflicted. *Garland, supra*, 267 F.2d at 791; *Cates v. Darland*, Okl., 537 P.2d 336, 340. The wealth of the defendant and the risk created by the defendant's conduct are substantial factors to be considered in calculat-

ing punitive damages. *Thiry, supra,* 661 P.2d at 518-519; *Smith v. United States Gypsum Co.,* Okl., 612 P.2d 251, 255. Under Oklahoma law punitive damages may be recovered in conjunction with nominal actual damages. *Beavers v. Lamplighters Realty, Inc.,* Okl. App., 556 P.2d 1328, 1333; *Moyer v. Cordell,* 204 Okl. 255, 228 P.2d 645, 650-651.

The defendant's conduct in maliciously allowing drainage of plaintiff's gas and in opposing her attempts to obtain relief, together with its net worth of three and one-third billion dollars, must be considered along with the injury inflicted, breach of an oil and gas lease implied covenant to protect against drainage. The trial court felt that the conduct of the defendant was so egregious that an award of Two Million Dollars in punitive damages was justified and necessary to punish the defendant. R. Vol. IX, pp. 612-613. We cannot say that the trial court abused its discretion.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-1752

SARAH M. SPAETH,
Appellee,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Appellant.

June 24, 1983

Robert J. Emery, Oklahoma City, Okl. (James M. Gaitis of Emery, McCandless, Gaitis, Bruehl & Gerstandt, and Harry H. Selph, II, of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Okl., with him on brief), for appellee.

H.B. Watson, Jr., Oklahoma City, Okl. (Richard K. Books of Watson, McKenzie & Moricoli, Oklahoma City, Okl., with him on briefs), for appellant.

Before McWILLIAMS, McKAY and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This diversity action presents a claim by a lessor against a lessee for tortious breach of an Oklahoma oil and gas lease implied covenant to protect against drainage. After trial the jury found that the defendant had breached the lease and awarded both actual and punitive

damages. Subsequently, the court awarded partial lease cancellation. The appeal of the lessee raises many issues of fact and law. We affirm the jury verdict that defendant breached the lease and the court decision for partial lease cancellation. We reverse the awards of actual and punitive damages.

The basic facts are not disputed. Plaintiff-appellee Spaeth owns an undivided one-half mineral interest in approximately 160 acres of the Northeast Quarter of Section 4. In 1956 her predecessor in title made an oil and gas lease of the land to defendant-appellant Union Oil Company of California. By order of December 28, 1965, the Oklahoma Corporation Commission, hereafter Commission, designated Section 4 as a single drilling and spacing unit for the Morrow common source of supply, the oil and gas bearing formation underlying the area. Union drilled what is known as the Schneider well on Section 4. Production from the well commenced in May, 1967.

Union has the following additional interests in the immediate area: (1) approximately one-half of the working interest in Section 3 (immediately to the east of Section 4); (2) one-fourth of the working interest in Section 9 (immediately to the south of Section 4); and (3) three-eighths of the working interest in Section 10 (immediately to the southeast of Section 4).

Sections 3, 9, and 10 are also single drilling and spacing units for the Morrow common source. Each contains one well. Union operates the well on Section 3. Amoco Production Company operates the wells on Sections 9 and 10.

On February 13, 1975, Ralph Harvey, president of Marlin Oil Company, filed an application with the Commission for permission to drill an additional well on Section 4. At the time neither Harvey nor Marlin had any interest in Section 4. Union appeared before the Commission's Trial Examiner and opposed Harvey's applica-

tion. The Commission denied the application on June 11, 1975. Before filing the application, Harvey had corresponded with Union concerning the drilling of an additional well on Section 4 and Union had rejected his proposals.

Spaeth and other owners of mineral interests in Section 4, on January 29, 1976, filed an application with the Commission for authorization to drill another well on Section 4. Union appeared before the Commission and resisted the application. The Commission denied the application on June 22, 1976. Spaeth then appealed to the Oklahoma Supreme Court.

On October 25, 1976, counsel for Spaeth wrote Union that the wells in Sections 3, 9, and 10 were causing substantial drainage of gas from Section 4 which Union permitted by failing to drill another well and by opposing Spaeth's application for another well. The letter gave Union the option of drilling another well, releasing the lease within 90 days, or facing an action for lease cancellation.

The instant action was filed in state court on February 20, 1979, and removed to federal court on diversity grounds. Before the case went to trial the Oklahoma Supreme Court reversed the Commission's denial of the Spaeth application. *Spaeth v. Corporation Commission*, Okl., 597 P.2d 320. Union filed a petition for rehearing which was denied. Pursuant to the court's mandate, the Commission, on December 20, 1979, authorized another well on Section 4. Union then expressed willingness to drill an additional well if Spaeth abandoned her cancellation claim. She refused to do so. The case then proceeded to a simultaneous trial to a jury on the questions of liability and damage and to the court on the question of lease cancellation. The jury found Union liable and awarded Spaeth $22,807 in actual damages and three million dollars in punitive damages. The court ordered

lease cancellation except as to the limited right to produce and market gas and condensate from the Schneider well on Section 4. R. 296.

Plaintiff Spaeth claims fraudulent drainage by the three wells in adjoining sections. Union is the operator of one of the wells and has a substantial interest in the other two. The Spaeth well is towards the edge of the formation with less pressure than the three other wells which are located near the top of the formation. The well on the Spaeth section reaches a tighter and less productive sand than that found under the other three wells. Two witnesses for Spaeth testified as to drainage. Harvey, Tr. 170, 175-181; and Flesher, Tr. 76-80. Two witnesses for Union conceded the fact of drainage. Hughes, Tr. 278-282; and Cunningham, Tr. 431-432, 447. The fact of substantial drainage is supported by the evidence.

Oklahoma law recognizes that, absent an express provision, an oil and gas lease contains an implied covenant to protect against drainage. The prudent operator rule is usually the yardstick to determine compliance with this covenant. *Sunray Mid-Continent Oil Co. v. McDaniel*, Okl., 361 P.2d 683, 685. Union asserts that the prudent operator rule does not apply because the spacing order prevented it from drilling another well on Section 4. This argument was specifically rejected by the Oklahoma Supreme Court in *Corporation Commission v. Union Oil Company of California*, Okl., 591 P.2d 711, 715, which, after quoting 52 O.S. 1971 § 87.1(c) said:

> ". . . the statute allows the Commission to authorize the drilling of an additional well within a drilling or spacing unit upon proof that the additional well or modification of the previous order will assist in preventing waste or the protection of correlative rights of persons interested in the common source of supply."

Although Oklahoma does not appear to have determined whether, under a protection covenant, a lessee is required to seek administrative relief from a spacing and drilling order, we have held that the acceptance of an argument similar to that of Union is to give a "license to drain gas," and "[i]t would be grossly inequitable to confer such windfalls." *Cook v. El Paso Natural Gas Co.*, 10 Cir., 560 F.2d 978, 982. Union had a duty, which it could not ignore, to seek administrative relief. See *Sinclair Oil & Gas Co. v. Bishop*, Okl., 441 P.2d 436, 447.

Union opposed both Spaeth's application to the Commission for permission to drill another well on Section 4 and Spaeth's appeal from the Commission order to the Oklahoma Supreme Court. Union justifies its conduct by saying that it relied on the advice of its experts. The argument has no merit. In its decision reversing the Commission, the Oklahoma Supreme Court pointed out that before the Commission Spaeth offered evidence of an expert supported by technical data and that Union offered no expert testimony. *Spaeth v. Corporation Commission*, supra, 597 P.2d at 322. We find nothing in the record to sustain Union's claim of good faith reliance on its experts. The reasonable inferences are all to the contrary.

Union argues that the filing of this suit suspended any duties which it owed under the protection covenant. A demand for performance of an implied covenant is prerequisite to an action for breach of that covenant. *Vincent v. Tidewater Oil Programs, Inc.*, Okla., 620 P.2d 910, 916. Spaeth made her demand on October 25, 1976. That demand did not suspend any duty owed under the lease. The filing of suit to cancel or terminate a lease excuses the lessee's performance of an implied covenant. *Hoyt v. Continental Oil Co.*, Okl., 606 P.2d 560, 562. That suspension has no effect on the rights of the lessor which have accrued when suit is filed.

Before this suit was filed, gas produced from Section 4 was sold to Oklahoma Natural Gas Co. at 21.2 cents

per MCF, thousand cubic feet. After the suit was filed, Oklahoma Natural Gas agreed to pay $1.03 per MCF for gas produced from a second well on Section 4. Union says that, until the increase, the drilling of a second well was not potentially profitable and, hence, the well would not have been drilled by a prudent operator.

The evidence on profitability is conflicting. Spaeth's witness Harvey testified that a prudent operator would have drilled a well as early as 1973 and realized a profit. Tr. 174-175. Defense witness Eggebretcht calculated the return on investment would be only 3.3% on a well drilled in 1976. Tr. 347-348. Defense witness Cunningham said that a prudent operator would not have drilled in 1976 because of an unfavorable profit to investment ratio. Tr. 390. On rebuttal Harvey attacked the defense figures as omitting the value of condensate to be recovered and overestimating the costs of drilling. Tr. 474-480. He presented his analysis of the economic aspects of drilling another well in 1976 and estimated the profit to investment ratio to be five to one. Tr. 483. The jury resolved the evidentiary conflict in favor of Spaeth. Its verdict has substantial evidentiary support.

The issue of lease cancellation was submitted to, and considered by, the court as a matter of law. The court ordered cancellation of the Section 4 lease "save and except that portion of the leasehold which has been properly developed through the Schneider 1-4 well." R. 296. The court's findings of fact are consistent with the jury verdict and are not clearly erroneous. Union argues that lease cancellation, after an award of both actual and punitive damages, is an impermissible double recovery. We do not agree. The court held, R. 295, that the "actions and inactions of Union Oil Company were in breach and disregard of the duties it owed to Sarah M. Spaeth to protect her mineral estate from drainage and to fully develop that mineral estate." The court also characterized Union's conduct toward Spaeth as "either a willful,

fraudulent or grossly negligent breach of the duty owed to her." R. 296. In *Barnes v. Mack Oil Co.*, Okl., 376 P.2d 279, a trial court judgment awarding drainage damage and partial cancellation was affirmed. As to cancellation for breach of an implied covenant, the court said, *Id.* at 281, that it "must look to the facts and circumstances of each case." The trial court examined the facts and circumstances in the case at bar. We agree with it that the equities warrant partial cancellation.

Union objects to the court's instructions on various grounds, most of which relate to the application of the prudent operator rule. The instructions are consistent with the views herein stated with regard to that rule. We are not impressed with the Union argument that the instructions shifted the burden of proof. We do not read the instructions as having that effect.

The jury awarded $22,807.00 in actual damages. We find nothing in the record to sustain that award. Flesher, a witness for the plaintiff, testified that drainage until January 1, 1981, was 7.2 billion cubic feet of gas, Tr. 78; that the value of Spaeth's lost royalty on gas was $16,320.00, Tr. 81; and that her value on lost condensate royalty was $1,132.00, Id., for a total of $17,452.00. The estimates of other witnesses were even lower. See Harvey, Tr. 170, 519-520; Hughes, Tr. 280; Eggebretcht, Tr. 351-352; and Cunningham, Tr. 431-432, 447. We are not impressed with Spaeth's efforts to sustain the jury award of actual damages. Viewing the record in the light most favorable to the plaintiff, the prevailing party, the recovery of actual damages is limited to $17,452.

The jury awarded punitive damages in the amount of three million dollars. Union says that punitive damages are improper and that the award is excessive. The applicable Oklahoma statute says that in any action for breach of an obligation not arising from the contract where the defendant is guilty of fraud or oppression, actual or presumed, the jury in addition to actual damages

"may give damages for the sake of example, and by way of punishing the defendant." Okl.Stat.Ann. tit. 23, § 9 (1951).

Union argues that the case is one for breach of contract and punitive damages are not permitted under Oklahoma law. We do not agree. Plaintiff complained of both failure to drill and tortious drainage. The court instructed the jury that if it found that Union's act or omission "was maliciously, or wantonly, or oppressively done," punitive damages may be awarded. Tr. 559. The court then defined "maliciously," "wantonly," and "oppressively." Id. at 559-560. In *Misco Leasing, Inc. v. Keller*, 10 Cir., 490 F.2d 545, 549, we considered the Oklahoma law on punitive damages and said:

> ". . . when there is a reckless and wanton disregard of another's rights, malice and evil intent may be inferred and punitive damages may be awarded."

The evidence shows a reckless and wanton disregard by Union of Spaeth's rights and sustains a reasonable inference of malice and evil intent. The court properly submitted the punitive damage issue to the jury. The question is whether the award is excessive. If the award resulted from passion and prejudice, a new trial on the amount of punitive damages would be in order. Essentially the dispute was between two oil companies. The plaintiff was assisted and financed by Marlin Oil Company and it was entitled to participate in any damage award. Tr. 203-205. The trial was a contest between experts and was completely devoid of emotional overtones.

Oklahoma permits evidence of defendant's net worth to be considered in determining punitive damages. *Smith v. United States Gypsum Co.*, Okl., 612 P.2d 251, 255, and *Basden v. Mills*, Okl., 472 P.2d 889, 896. In applying Oklahoma law we have held that "exemplary [punitive] damages must bear some relation to the injuries inflicted and the cause thereof." *Garland Coal & Mining Company v. Few*, 10 Cir., 267 F.2d 785, 791.

Under the controlling Oklahoma statute, Okla.Stat.Ann. tit. 23, § 9, punitive damages may be awarded for the sake of example or by way of punishment. The deterrent or punishment value of a punitive award varies from case to case. Cf. *Cities Service Oil Co. v. Merritt*, Okl., 332 P.2d 677 with *Jones v. Lennington*, Okl.Ct.App., 629 P.2d 805. The applicable criteria are (1) the amount needed to punish, (2) in the circumstances presented. Id. at 807. The Supreme Court has characterized a punitive award as a "discretionary moral judgment." *Smith v. Wade*, —— U.S. ——, 103 S.Ct. 1625, 1638, 75 L.Ed.2d 632. Absent an award which shocks the judicial conscience, a jury's determination is inviolate. *Melcalfe v. Atchison, Topeka & Santa Fe Railway Co.*, 10 Cir., 491 F.2d 892, 898, and *Oller v. Hicks*, Okl., 441 P.2d 356, 360.

On the record presented the punitive award shocks our collective judicial conscience. When the jury returned its verdict, it did not know that the court would later cancel the lease except for the one well Union was operating. Spaeth may now lease to another oil company. The loss of lease is a circumstance for consideration in evaluating the punitive award. In denying the motion for a new trial, so far as punitive damages are concerned, the court abused its discretion by not taking into account all the circumstances pesented.

We have considered *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 10 Cir., 703 F.2d 1152, and conclude that it is inapposite because of factual differences and because it applies Colorado law whereas the instant case is governed by Oklahoma law.

In the exercise of our power under 28 U.S.C. § 2106, we remand the case to the district court with directions (1) to enter a judgment for the plaintiff and against the defendant in the amount of $17,542 for actual damages, (2) to set aside and vacate the award of punitive dam-

ages, (3) to order a remittitur of a substantial amount in punitive damages with due consideration to the amount needed to punish the defendant in the particular circumstances presented, and (4) if the plaintiff does not accept the remittitur, to hold a jury trial solely on the amount of punitive damages.

Reversed in part and affirmed in part. The costs in this court shall be equally divided.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-79-345-T

SARAH M. SPAETH,

Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

[Filed May 11, 1984]

JUDGMENT ON JURY VERDICT
AND
JUDGMENT ON DECISION BY THE COURT
AND
JUDGMENT ON REMAND

On the 9th day of March, 1981, this action came on for trial pursuant to regular jury docket setting, with the jury determining the questions of liability for monetary damages and the Court reserving the equitable determination of the issue of lease cancellation, the case being simultaneously tried to a jury and to the Court on March 9, 10 and 11, 1981.

Plaintiff appeared in person and by and through her attorneys, Harry H. Selph, II, Thomas T. Rogers and Robert J. Emery and the defendant appeared through its attorneys, Richard K. Books and H. B. Watson, Jr. Both sides announced ready to proceed with the trial. A jury of six men and women and two alternates were impaneled and sworn to well and truly try the action and evidence was simultaneously presented to them and to the Court.

At the conclusion of Plaintiff's evidence the Defendant moved for a directed verdict on the grounds that Plaintiff had wholly failed to prove the essential elements of her causes of action against the Defendant. The Court heard arguments of counsel for both parties and overruled Defendant's motion.

Thereafter, the trial upon the merits continued and the Defendant presented its evidence and rested. Thereupon, Plaintiff presented rebuttal evidence. After all the evidence was presented both sides rested. Both parties then presented motions for directed verdicts which were overruled by the Court.

The jury then heard the arguments of counsel and the Court thereupon instructed the jury and at the conclusion thereof, on due deliberation, the jury upon their oaths, returned a verdict, as follows:

> We, the Jury, find in favor of the plaintiff, Sarah M. Spaeth, and against the defendant, Union Oil Company of California, and fix plaintiff's actual damages in the amt of $22,807.00.
>
> We further award the plaintiff exemplary damages in the amount of $3 Million.

3-11, 1981	/s/ Joseph Turner
(Date)	(Foreman)

The Court then polled the jury and, finding that the verdict was the verdict of each juror, received the verdict and after concluding it was in proper form directed that it be filed of record in the case.

Upon the issue of lease cancellation reserved by the Court for equitable determination, the Court, having heard the testimony of witnesses sworn and examined in open court and having reviewed the exhibits offered and received into evidence and having heard argument of

counsel and being fully advised in the premises issued its Memorandum Opinion, which was filed in this cause on March 17, 1981, setting forth its findings of fact and conclusions of law thereon and its decision that the subject oil and gas lease should be partially cancelled.

Thereafter, Defendant perfected an appeal to the United States Court of Appeals for the Tenth Circuit and on July 20, 1983, the Court entered its opinion remanding the action to the United States District Court for the Western District of Oklahoma with directions (1) to enter a judgment for the Plaintiff and against the Defendant in the amount of $17,542.00 for actual damages, (2) to set aside and vacate the award of punitive damages, (3) to order a remittitur of a substantial amount in punitive damages with due consideration to the amount needed to punish the Defendant in the particular circumstances presented, and (4) to hold a jury trial solely on the amount of punitive damages if the Plaintiff did not accept the remittitur. On April 25, 1984, this Court directed a remittitur by the Plaintiff in the amount of one million dollars. On May 8, 1984, Plaintiff filed a remittitur of one million dollars.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That Plaintiff have recover from the Defendant the sum of $17,542.00 with interest thereon from March 11, 1981, at the rate of twelve per centum (12%) per annum, as provided by law, until paid and her costs of this action.

That Plaintiff have and recover from the Defendant the sum of Two Million and no/100 Dollars ($2,000,000.00) with interest thereon from March 11, 1981, at the rate of Twelve per centum (12%) per annum, as provided by law, until paid.

That the certain Oil and Gas Lease from Harry J. Galligan, as Lessor, to Union Oil Company of California,

as Lessee, dated October 29, 1956, and recorded December 8, 1956, in Book 38 Leases at page 228 of the records of the office of the County Clerk of Blaine County, Oklahoma, covering the following described tract of land in Blaine County, Oklahoma, to-wit:

> Lots 1 and 2 and the South Half of the Northeast Quarter of Section 4, Township 17 North, Range 11 West, and containing 157.69 acres, more or less,

be and the same is hereby, cancelled of record insofar and only insofar as the mineral estate of Sarah M. Spaeth is concerned, and the Defendant and all persons holding by, through or under it, are adjudged to have no right, title or interest therein and are perpetually enjoined and restrained from exercising, or attempting to exercise, any right or interest therein except the limited right to continue to produce and market gas and condensate from the Morrow Sand common source of supply as the same may be produced from, and only from, the existing bore hole or well known as the Schneider No. 1-4 well located in the Northeast Quarter of the Southwest Quarter of said Section 4; provided, that such limited right to produce and market gas and condensate shall continue only so long as such production from the Schneider No. 1-4 well shall, when considered alone, be in commercial quantities, it being intended by this Judgment that said Defendant be under the continuing duty or implied covenant under said lease for diligent and proper operation of the Schneider No. 1-4 well and for marketing the product therefrom insofar as the Morrow Sand common source of supply is concerned.

DATED this 11th day of May, 1984.

/s/ Roy G. Thompson
United States District Judge

Entered in judgment docket May 11, 1984

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-79-345-T

SARAH M. SPAETH,
Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Defendant.

[Filed Mar. 24, 1981]

JUDGMENT ON JURY VERDICT
AND
JUDGMENT ON DECISION BY THE COURT

On the 9th day of March, 1981, this action came on for trial pursuant to regular jury docket setting, with the jury determining the questions of liability for monetary damages and the Court reserving the equitable determination of the issues of lease cancellation, the case being simultaneously tried to a jury and to the Court on March 9, 10 and 11, 1981.

Plaintiff appeared in person and by and through her attorneys, Harry H. Selph, II, Thomas T. Rogers and Robert J. Emery and the defendant appeared through its attorneys, Richard E. Books and H. B. Watson, Jr. Both sides announced ready to proceed with the trial. A jury of six men and women and two alternates were im-

paneled and sworn to well and truly try the action and evidence was simultaneously presented to them and to the Court.

At the conclusion of Plaintiff's evidence the Defendant moved for a directed verdict on the grounds that Plaintiff had wholly failed to prove the essential elements of her causes of action against the Defendant. The Court heard arguments of counsel for both parties and overruled Defendant's motion.

Thereafter, the trial upon the merits continued and the Defendant presented its evidence and rested. Thereupon, Plaintiff presented rebuttal evidence. After all the evidence was presented both sides rested. Both parties then presented motions for directed verdicts which were overruled by the Court.

The jury then heard the arguments of counsel and the Court thereupon instructed the jury and at the conclusion thereof, on due deliberation, the jury upon their oaths, returned a verdict, as follows:

> We, the Jury, find in favor of the plaintiff, Sarah M. Spaeth, and against the defendant, Union Oil Company of California, and fix plaintiff's actual damages in the amount of $22,807.00.
>
> We further award the plaintiff exemplary damages in the amount of $3 Million.

3-11, 1981.	/s/ Joseph Turner
(Date)	(Foreman)

The Court then polled the jury and, finding that the verdict was the verdict of each juror, received the verdict and after concluding it was in proper form directed that it be filed of record in the case.

Upon the issue of lease cancellation reserved by the Court for equitable determination, the Court, having

heard the testimony of witnesses sworn and examined in open court and having reviewed the exhibits offered and received into evidence and having heard argument of counsel and being fully advised in the premises issued its Memorandum Opinion, which was filed in this cause on March 17. 1981, setting forth its findings of fact and conclusions of law thereon and its decision that the subject oil and gas lease should be partially cancelled.

IT IS THEREFORE ORDERED AND ADJUDGED:

That Plaintiff have and recover from the Defendant the sum of $22,807.00 with interest thereon from March 11, 1981, at the rate of twelve per centum (12%) per annum, as provided by law, until paid and her costs of this action.

That Plaintiff have and recover from the Defendant the sum of Three Million and no/100 Dollars ($3,000,000.00) with interest thereon from March 11, 1981, at the rate of Twelve per centum (12%) per annum, as provided by law, until paid.

That the certain Oil and Gas Lease from Harry J. Galligan, as Lessor, to Union Oil Company of California, as Lessee, dated October 29, 1956, and recorded December 8, 1956, in Book 38 Leases at page 228 of the records of the office of the County Clerk of Blaine County, Oklahoma, covering the following described tract of land in Blaine County, Oklahoma, to-wit:

> Lots 1 and 2 and the South Half of the Northeast Quarter of Section 4, Township 17 North, Range 11 West, and containing 157.69 acres, more or less,

be, and the same is hereby, cancelled of record insofar and only insofar as the mineral estate of Sarah M. Spaeth is concerned, and the Defendant and all persons holding by, through or under it, are adjudged to have no right, title or interest therein and are perpetually enjoined and restrained from exercising, or attempting to

exercise, any right or interest therein except the limited right to continue to produce and market gas and condensate from the Morrow Sand common source of supply as the same may be produced from, and only from, the existing bore hole or well known as the Schneider No. 1-4 well located in the northeast Quarter of the Southwest Quarter of said Section 4; provided, that such limited right to produce and market gas and condensate shall continue only so long as such production from the Schneider No. 1-4 well shall, when considered alone, be in commercial quantities, it being intended by this Judgment that said Defendant be under the continuing duty or implied covenant under said lease for diligent and proper operation of the Schneider No. 1-4 well and for marketing the product therefrom insofar as the Morrow Sand common source of supply is concerned.

DATED this 24th day of March, 1981.

/s/ Roy G. Thompson
United States District Judge

Entered in judgment docket 3-24-81

APPENDIX E

MAY TERM—July 2, 1985

Before Honorable William J. Holloway, Jr., Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, and Honorable John P. Moore, Circuit Judges.

No. 84-1766

SARAH M. SPAETH,
Plaintiff-Appellee.

v.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX F

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

Cause CD No. 43460
Order No. 122300

Applicants:	SARAH M. SPAETH, WILLIAM KELLY CRONKHITE, WINNIE MAY HOWELL and WALTER SCHNEIDER
Nature of Cause:	TO PERMIT ADDITIONAL WELL TO BE DRILLED WITHIN ESTABLISHED MORROW SPACING UNIT
Land Covered:	SECTION FOUR, TOWNSHIP SEVENTEEN NORTH, RANGE ELEVEN WEST (Sec. 4-17N-11W), BLAINE COUNTY, OKLAHOMA

REPORT OF THE COMMISSION

This Cause came on for hearing before the Corporation Commission of the State of Oklahoma on May 7, 1976, at 10:00 a.m., in the Commission Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, on motion of the Applicant to recall said cause from the Trial Examiner's docket. The Honorable Rex Privett, Chairman; Hamp Baker, Vice-Chairman; and Jan Eric Cartwright, Commissioner; sitting.

Robert J. Emery, Attorney, appeared for the Applicants; H. B. Watson, Jr., Attorney, appeared for Union

Oil Company of California; Gordon B. Ryan, Attorney, appeared for Amoco Production Company; Harold Thweatt, Attorney, appeared for Ashland Oil, Inc.; and Nell Rhodes Fisher, Assistant Conservation Attorney, appeared for the Commission.

The Commission having heard all of the evidence and argument of counsel, took the matter under advisement and now, on this 15th day of May, 1976, the Commission being in executive session and having considered all the evidence in this cause, finds as follows:

FINDINGS

1. That this is an application of Sarah M. Spaeth, William Kelly Cronkhite, Winnie May Howell, and Walter Schneider, for an order permitting the drilling of an additional well to the Morrow formation underlying Section 4, Township 17 North, Range 11 West, Blaine County, Oklahoma, which governmental section constitutes a single drilling and spacing unit for the production of oil and gas from said formation by prior Order of the Commission.

2. That the Commission has jurisdiction over the subject matter herein; that notice has been given in all respects as required by law and by the rules of the Commission.

3. That the evidence reveals that all of the oil, gas and other mineral rights are under lease, with Union Oil Company of California owning 157.69 leasehold acres, Texaco Inc. owning 160 leasehold acres, Ashland Oil, Inc. owning 160 leasehold acres, and Getty Oil Company owning 156.8 leasehold acres. The Applicants have no oil and gas leasehold ownership and do not have the right to drill a well within the unit.

4. That the evidence further reveals that Ralph L. Harvey owns an interest in the oil, gas and other minerals in and under the Southeast Quarter and the North-

west Quarter of said Section 4 by virtue of mineral conveyances from Winnie M. Howell and the Board of National Missions of the United Presbyterian Church in the United States of America. That said conveyances provide that the grantors in each of said conveyances reserve all of the existing 1/8 lessor's royalty attributable to the interest conveyed in and to, but only in and to, the existing well located on said unit. Said interest is subject to valid and subsisting oil and gas leases.

5. This Commission, by Order No. 61106, designated said Section 4 as a single drilling and spacing unit for the production of oil and gas from the Morrow common source of supply. Thereafter, Union Oil Company of California, as operator of said unit, drilled its #1 Schneider Well, which well has been producing oil and gas in commercial quantities since April, 1967. That said Order No. 61106 provided for the drilling of only one well on said drilling and spacing unit.

6. That the evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of condition since Order No. 61106 was entered. The evidence establishes that each of the peripheral eight sections surrounding said Section 4 contain a single producing Morrow well, all of which are located on the pattern established by orders of this Commission. The evidence fails to establish the violation of the correlative rights of the applicants or of the owners of the oil and gas rights in and under the unit in question, as well as the eight peripheral units.

7. Therefore, taking into consideration all of the evidence presented and the arguments of counsel, the Commission finds that in the interest of securing the greatest ultimate recovery of petroleum hydrocarbons from the reservior, the prevention of waste and the protection of correlative rights, this application should be denied.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of Oklahoma as follows:

THAT the Application of Sarah M. Spaeth, William Kelly Cronkhite, Winnie May Howell, and Walter Schneider for an order permitting the drilling of an additional well to the Morrow common source of supply underlying Section 4, Township 17 North, Range 11 West, Blaine County, Oklahoma, be and the same is hereby denied.

DONE AND PERFORMED this 22nd day of June, 1976.

CORPORATION COMMISSION
OF OKLAHOMA

/s/ [Illegible]
Chairman

/s/ [Illegible]
Vice-Chairman

/s/ [Illegible]
Commissioner

APPENDIX G

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 49,954

SARAH M. SPAETH, WILLIAM KELLY CRONKHITE,
WINNIE MAY HOWELL and WALTER SCHNEIDER,
Appellants,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,
UNION OIL COMPANY OF CALIFORNIA,
ASHLAND OIL, INC. and GETTY OIL COMPANY,
Appellees.

[Filed May 8, 1979]

Appeal from the Corporation Commission
of the State of Oklahoma

Appellants sought an order which would have permitted the drilling of an additional well on a drilling and spacing unit established by the Corporation Commission. Appellants were denied relief and they appealed.

ORDER REVERSED

Robert J. Emery Lytle Soulé & Emery Oklahoma City, Oklahoma	For Appellants,
H. B. Watson, Jr., Watson, McKenzie & Moricoli Oklahoma City, Oklahoma	For Appellee Union Oil Company of California
C. Harold Thweatt Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick Oklahoma City, Oklahoma	For Appellees Ashland Oil, Inc. and Getty Oil Company.

IRWIN, V.C.J.

Appellants, Sarah M. Spaeth and various other mineral owners, filed an application with the Corporation Commission for a modification of a previous order creating 640 acre drilling and spacing units within the common source of supply to permit the drilling of an additional well to protect appellants from drainage and consequent prejudice of their correlative rights.[1] Union Oil Company, the well operator in the affected drilling and spacing unit, Ashland Oil Company, Inc., and Getty Oil Company, adjoining operators, intervened as contestants to the application. By Order No. 122,300, Commission denied appellants' requested modification, and they appealed.

Union first contends that appellants had no standing to request the modification. 52 O.S. 1971, § 87.1(a) authorizes the Commission to enter an order after hearing upon petition of any person owning an interest in minerals embraced within the common source of supply or the right to drill upon lands embraced within the common source of supply. *Texas Oil and Gas Corporation v. Rein*, Okl., 534 P.2d 1277 (1975). Also, 52 O.S. 1971, § 112, provides in part:

> "Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify or supplement the same * * *."

Appellants not only owned an interest in the minerals involved but had been affected by the Commission's order establishing the drilling unit in the common source of supply. We hold appellants had standing to seek the relief requested. Whether they are entitled to any relief is an entirely different matter.

---

[1] Appellants sought authority to drill an additional well on the drilling and spacing unit and did not seek two allowables, but only a single allowable.

The record discloses a common source of supply for natural gas in the Morrow formation, underlying part of Township 17, Range 11 West, Blaine County, Oklahoma. By Order No. 59,245, entered June 17, 1965, the Commission created 640 acre drilling and spacing units for the Morrow underlying Sections 10 through 15 and 22 through 24 of Township 17. This order was entered on the strength of information obtained from a producing well drilling in Section 14. By Order No. 61,106, entered December 28, 1965, the Commission extended Order No. 59,245 to include Sections 1 through 5, 8, 9, 16, 17, 20, 21, and 25 through 29 of Township 17. Evidently, Order No. 61,106 was entered on the strength of information obtained from the well in Section 14 as there was no additional development in the area between the June and December order.

In 1966 and 1967 wells were drilled and completed in Sections 3, 4, 9 and 10. Appellants are mineral owners of acreages underlying Section 4. The well in Section 4 is, relatively speaking, a poor well. Testimony on behalf of appellants was that past production and potential future recovery from adjoining wells east, southeast and south of Section 4 was and would continue to be many times greater than in Section 4. Appellants' expert believed that porosity factors are such in the common source of supply that these better producing wells have been and will continue to drain gas from under Section 4. That testimony was based on data resulting from the four wells drilled since the last order.

The Commission, in denying appellants' application for modification, made the following findings:

> "6. That the evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of conditions since Order No. 61,106 was entered. * * * The evidence fails to establish the violation of the correlative rights of the

applicants or of the owners of the oil and gas rights in and under the unit in question * * *."

A spacing order which has become final may be modified only upon substantial evidence which shows a change in conditions, or a change in knowledge of conditions, arising since the last order. *Phillips Petroleum Co. v. Corporation Commission*, Okl., 461 P.2d 597 (1969). As in other Commission proceedings, the substantial evidence rule controls in appeals involving oil and gas conservation orders. *French v. Champlin Exploration, Inc.*, Okl., 534 P.2d 1302 (1975). This Court had on numerous occassions repeated the definition of "substantial evidence". See *Central Oklahoma Freight Lines v. Corporation Commission*, Okl., 484 P.2d 877 (1971).

Virtually all of the evidence before the Commission was presented by appellants. Based upon data obtained as a result of the wells in Section 3, 4, 9 and 10, their expert testified that the wells in Section 3, 9 and 10 were draining Section 4. He said that we now have information involving the reservoir that we did not have when the first orders were entered; and that the changes in knowledge and conditions are substantial changes. This expert was of the opinion that the well in Section 4 was not capable of protecting Section 4 from drainage from the wells in Section 3, 9 and 10. In order to stop the drainage, he was of the opinion an additional well had to be drilled in Section 4. The expert's opinion was supported by technical data. Appellees offered no expert testimony but did cross-examine appellants' witness on all matters. Notwithstanding this lengthy questioning, appellants' expert testimony remained consistent. We can only conclude there is no substantial evidence that will support Commission's finding that the "evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of conditions" since the previous spacing order, and its finding that "the evidence fails to establish the violation of the correlative

rights of the applicants or of the owner of the oil and gas rights in and under the unit in question." Appellants are entitled to a reversal of the Commission's order.

Appellants suggest that under 52 O.S. 1971, § 112, this Court on appeal, "may itself make the order which the Commission should have made". Section 112 was enacted in 1933 and at that time the Supreme Court had "jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority * * *." See Oklahoma Constitution, 1931, § 13605. Section 13605 was amended in 1941, and Article 9, § 20 of the Oklahoma Constitution now provides that the Supreme Court "shall enter judgment, either affirming or reversing the order of the Commission appealed from."

Order reversed.

LAVENDER, C.J., WILLIAMS, HODGES, BARNES, SIMMS, HARGRAVE, OPALA, JJ., CONCUR. DOOLIN, J., DISSENTS.

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SARAH M. SPAETH,
Respondent.

RESPONDENT SARAH M. SPAETH'S BRIEF IN OPPOSITION TO UNION OIL COMPANY OF CALIFORNIA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-550

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

SARAH M. SPAETH,

Respondent.

RESPONDENT SARAH M. SPAETH'S BRIEF IN OPPOSITION TO UNION OIL COMPANY OF CALIFORNIA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This matter comes before the Court on Petition of Union Oil Company of California ("Union Oil") for Writ of Certiorari (the "Petition") served upon Respondent Sarah M. Spaeth ("Spaeth") on October 1, 1985. In opposition thereto, Spaeth sets forth the pertinent facts, and controlling authorities, demonstrating that no reasons exist herein to grant Union Oil's Petition.

QUESTION PRESENTED

As a prefatory matter, and in order to assist the Court in analyzing whether sufficient reasons exist justifying fur-

ther review in this action, it must be emphasized that the "Question Presented" as framed by Union Oil is sophistic and does not set forth an issue that actually arises from the proceedings below. This is so for the reason that such "Question" is expressly founded on the incorrect premises that (a) Union Oil was assessed exemplary damages for a tort consisting merely in "participating in a state administrative proceeding", and that (b) Union Oil's conduct in this regard was "not shown to be engaged in for some purpose other than prevailing on the merits." A review of the factual findings in the various opinions below, which findings are not challenged on appeal by Union Oil,[1] clearly demonstrates that Union Oil's conduct was of materially greater breadth than intimated by its flawed "Question Presented."

The relevant opinions of the trial court and the court of appeals, and the related opinion of the Oklahoma Supreme Court in *Spaeth v. Corporation Commission*,[2] illustrate that Union Oil engaged in a prolonged, and willful, pattern of conduct designed to achieve the fraudulent drainage of Spaeth's mineral interests in derogation of Union Oil's duties as Spaeth's oil and gas lessee. Exemplary damages were assessed against Union Oil for the reason that Union Oil knowingly reaped the financial benefit of the drainage of 7.2 billion cubic feet of gas from under the subject lands, and tortiously breached its obligation to protect Spaeth's interests. Union Oil's conduct in failing to protect and, in fact, intentionally draining Spaeth's interests, and in opposing her efforts to obtain administrative relief in an instance in which Union Oil had a duty to seek such administrative relief on her behalf, was found to be (a) "a willful, fraudulent or grossly negligent breach of the

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[1]Union Oil's Petition at 6, fn. 8.

[2]597 P.2d 320 (Okla. 1979), Appendix C at 13a.

duty owed to [Spaeth]";[3] (b) in "reckless and wanton disregard" of Spaeth's rights and with "malice and evil intent";[4] (c) "particularly egregious";[5] and (d) malicious and "egregious."[6] Thus, Union Oil was found liable not on the basis of a single act — *i.e.*, its conduct in opposing Spaeth in proceedings before the Oklahoma Corporation Commission — but, rather, on the basis of a persistent course of conduct, over a prolonged period, effecting the fraudulent drainage of Spaeth's mineral interest.

At best then, the only real question that Union Oil could arguably present to this Court concerning Union Oil's actions before the Oklahoma Corporation Commission, as it relates to Union Oil's liability for its persistent course of conduct in fraudulently draining Spaeth's interests, is as follows:

> Whether Union Oil can claim immunity, under the First Amendment right to petition, from liability for exemplary damages in an instance in which Union Oil maliciously, fraudulently and with evil intent drained its oil and gas lessor's mineral interests and, in furtherance of the commission of that tort, intentionally failed to satisfy its duty to seek administrative relief on behalf of its lessor and instead, and for fraudulent purposes, resisted its lessor's efforts to obtain such relief.

OPINIONS BELOW

Union Oil correctly advises the Court of the citations to the two published opinions of the United States Court of

[3]District Court Memorandum Opinion, Appendix A at 8a.

[4]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1460 (10th Cir. 1983).

[5]District Court Order on Remand, Appendix B at 12a.

[6]*Spaeth v. Union Oil Co. of California*, 762 F.2d 865, 867 (10th Cir. 1985).

Appeals for the Tenth Circuit in this cause, and further correctly states that the orders and opinions of the district court are unreported. Union Oil incorrectly suggests that the orders and opinion of the district court are included in Union Oil's Petition as Appendices C and D, which Appendices contain only the district court's March 24, 1981 and May 11, 1984 Judgments. The March 17, 1981 Memorandum Opinion of the district court, which sets forth the express findings of fact and conclusions of law of the district court but to which Union Oil makes no reference in its Petition, is set forth in Appendix A hereto. The April 25, 1984 Order of the district court, which contains the district court's express findings on remand but to which Union Oil makes no reference in its Petition, is set forth in Appendix B hereto. The Oklahoma Supreme Court's Opinion in *Spaeth v. Corporation Commission*,[7] which Union Oil incorrectly characterizes as "unreported", is set forth in Appendix C hereto.

CORRECTED STATEMENT OF THE CASE

The subject action was instituted by Spaeth for the recovery of actual and punitive damages for "fraudulent drainage" — *i.e.*, drainage of Spaeth's mineral interest tortiously caused by, and inuring to the benefit of, her lessee, Union Oil, through its operation of, or participation in, adjacent offset wells in which Union Oil had an equal or greater percentage interest.[8] Union Oil's liability to Spaeth, as found by the jury, the district court, and the court of appeals below and as reflected in the opinions below of the district court and court of appeals, was based upon Union Oil's

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[7]597 P.2d 320 (Okla. 1979), Appendix C at 13a.

[8]The nature of Union Oil's duties to Spaeth as her oil and gas lessee under applicable Oklahoma law are discussed in the argument below. *Infra* at 14-15.

persistent, prolonged, egregious course of conduct in dealing with its lessor, Spaeth, and in effecting the substantial drainage of her mineral interest. Because Union Oil's "Statement" ignores both the nature, and the very existence, of the operative facts of this action which demonstrate Union Oil's lengthy course of malicious conduct and gave rise to its liability herein, Spaeth sets forth the following Corrected Statement of the Case pursuant to Rules 22 and 34 of the Supreme Court.

Spaeth's cause of action arises due to the existence of an oil and gas lease with Union Oil as lessee, covering Spaeth's undivided one-half mineral interest in approximately 160 acres in a governmental section of 640 acres described as Section 4, T-17-N, R-11-W, Blaine County, Oklahoma.[9] In 1965, the Oklahoma Corporation Commission (the "Commission") entered an Order creating a single 640-acre drilling and spacing unit, comprising all of said Section 4 (hereinafter the "Spaeth Unit"), for production of gas from the Morrow formation common source of supply underlying said land.[10] Union Oil drilled a well (the "Spaeth Unit well") on the Spaeth Unit, with production commencing in May, 1967.[11] Under the terms of said Order and relevant statutory law. only one well could be drilled in the Spaeth Unit until authority for a second well was sought by a subsequent application and approval obtained from the Commission. The Commission is empowered to grant such approval when such additional well is necessary for the purpose of prevent-

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[9]District Court Memorandum Opinion, Appendix A at 2a; *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[10]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[11]Id.

ing waste or protecting the correlative rights of interested parties.[12]

In addition to owning a one-fourth cost-bearing working interest in the Spaeth Unit, Union Oil owned (1) an approximate one-half cost-bearing working interest in Section 3 (a contiguous 640-acre Morrow Unit east of the Spaeth Unit); (2) a one-fourth cost-bearing working interest in Section 9 (a contiguous 640-acre Morrow Unit south of the Spaeth Unit); and (3) a three-eighths cost-bearing working interest in Section 10 (a contiguous 640-acre Morrow Unit southeast of the Spaeth Unit).[13] The Spaeth Unit and said Sections 3, 9 and 10 each contained one well at the time of trial, with Union Oil being the designated operator of both the Spaeth Unit well and the well located in Section 3.[14]

The expert petroleum engineering and geological testimony offered by Spaeth at trial, and upon which the jury's verdict, the district court's decisions, and the court of appeals' opinions were based, demonstrated that Union Oil had not only permitted but had actually caused the prolonged substantial drainage of Spaeth's interests and financially benefited therefrom. Spaeth's expert petroleum and geological engineer testified that it was evident as early as 1968 that the three offset wells which Union Oil operated or participated in were draining Spaeth's interest.[15]

In 1972, Ralph L. Harvey, an expert geologist and President of Marlin Oil Corporation, became interested in the

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[12]Okla. Stat. tit. 52, § 87.1(d) (Supp. 1984); *Corporation Commission v. Union Oil Co. of California*, 591 P.2d 711, 715 (Okla. 1979).

[13]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[14]Id.

[15]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 102.

potentiality for further petroleum exploration and development in the area in which the four pertinent drilling and spacing units were located. Mr. Harvey consequently performed a geological evaluation of the Spaeth Unit and the three offset units, and, after examining the available geological, pressure, and production data, which data was in the possession of or readily available to Union Oil, sought to purchase from Union Oil the right to conduct further exploration and drilling on the Spaeth Unit.[16] Union Oil declined the offer for "specious reasons."[17] The court of appeals noted that the acceptance of reasoning similar to that offered by Union Oil in declining said offer would result in the granting of a "license to drain gas."[18]

By 1976 the Spaeth Unit well had produced 1 billion cubic feet of natural gas, whereas the offset wells which Union Oil operated or participated in had *each* produced more than ten times that amount, with total cumulative production of 42 billion cubic feet for the three wells.[19] In early 1976, and due to Union Oil's failure to take any action to protect Spaeth's correlative rights and its *refusal to contract with a willing third party* to procure such protection, Spaeth and other parties owning mineral interests in the Spaeth Unit filed an Application with the Commission seeking a modification of the previously mentioned Commission Spacing Order "to permit the drilling of an additional well to protect [Spaeth and others] from drainage and consequent prejudice of their

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[16]*Id.* at 121-23.

[17]District Court Memorandum Opinion, Appendix A at 7a.

[18]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1458 (10th Cir. 1983).

[19]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 72-74.

correlative rights."[20] At the hearing on the merits of said Application, Spaeth offered substantial evidence demonstrating that the offsetting wells in which Union Oil owned an interest were draining hydrocarbons from beneath the Spaeth Unit.[21] Union Oil, in contrast, "offered no expert testimony but did cross-examine [Spaeth's] witnesses on all matters" through "lengthy questioning" in opposition to Spaeth's Application.[22] In June, 1976 the Commission denied Spaeth's Application.[23] The Commission's denial of the Application was appealed by Spaeth to the Oklahoma Supreme Court.[24]

In the latter part of 1976, legal counsel for Spaeth transmitted a letter to Union Oil wherein Spaeth placed Union Oil on legal notice that Spaeth was aware that the wells located in Sections 3, 9 and 10 were causing substantial drainage of the natural gas reserves underlying the Spaeth Unit, and that Union Oil was permitting such drainage to occur both by failing to drill another well thereon and by opposing Spaeth's Application seeking the authorization for the drilling of a protection well. The demand letter provided

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[20]*Spaeth v. Corporation Commission*, 597 P.2d 320, 321 (Okla. 1979), Appendix C at 14a. It bears mentioning that the above-quoted description by the Oklahoma Supreme Court of the purpose of Spaeth's Application differs materially from Union Oil's suggestion that Spaeth filed her Application simply because she had "decided that she would benefit if Union were to drill a second well on her property." (Union Oil's Petition at 3).

[21]*Spaeth v. Corporation Commission*, 597 P.2d 320, 321 (Okla. 1979), Appendix C at 16a.

[22]*Id.* at 322, Appendix C at 17a.

[23]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[24]*Spaeth v. Corporation Commission*, 597 P.2d 320 (Okla. 1979), Appendix C at 13a.

Union Oil the legally available option to drill another well to prevent such drainage, or alternatively required Union Oil to release its oil and gas lease within ninety days (in order that another lessee would be free to drill a protection well for Spaeth).[25] Union Oil took no action to satisfy Spaeth's demand.

By 1979, the year in which Spaeth commenced her action below, the Spaeth Unit well had produced 2 billion cubic feet of natural gas, whereas the three offset wells which Union Oil operated or participated in had collectively produced 57 billion cubic feet.[26] Spaeth commenced her action against Union Oil in February, 1979. In May, 1979, a date prior to the trial in this action, the Oklahoma Supreme Court reversed the Commission's denial of Spaeth's Application.[27] In reversing the Commission, the Oklahoma Supreme Court found that "*there is no substantial evidence*" that would support Union Oil's contention that Spaeth's interests were not being drained.[28] Union Oil sought to reverse the Oklahoma Supreme Court's decision by filing a Petition for Rehearing, which Petition was denied.[29] In December, 1979, more than three years after Spaeth demanded that Union Oil act voluntarily to drill a protection well, the Commission authorized the drilling of an additional well in the Spaeth Unit pursuant to the mandate of the Oklahoma Supreme

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[25]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[26]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 74-75.

[27]*Spaeth v. Corporation Commission*, 597 P.2d 320 (Okla. 1979), Appendix C at 13a.

[28]*Id.* at 322 (emphasis added), Appendix C at 17a.

[29]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

Court.[30] On March 9, 1981, Spaeth's action came on for trial before the court and jury. By the time of trial the Spaeth Unit well had produced 2.4 billion cubic feet of natural gas, whereas the three offset wells which Union Oil operated or participated in had collectively produced 67 billion cubic feet.[31]

Subsequent to the entry of the jury's verdict, the district court issued its March 17, 1981 Memorandum Opinion upholding the jury verdict and partially cancelling Union Oil's oil and gas lease. In the Memorandum Opinion, which was neither included in Union Oil's citations to Opinions Below nor set forth in its Appendices, the district court set forth the following express findings of fact and conclusions of law regarding Union Oil's course of conduct with respect to its oil and gas lessor, Spaeth:

(1) That substantial drainage had occurred from Spaeth's land into the adjoining lands in which Union Oil owned oil and gas leasehold interests;

(2) That Union Oil operated one of the draining wells and owned a substantial interest in each of the draining wells;

(3) That Spaeth made demands upon Union Oil to develop her lease and protect her interests from drainage;

(4) That at the time such demands were made Union Oil had superior knowledge of the relevant facts by virtue of its operation of the wells in the Spaeth Unit and an offsetting unit;

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[30]*Id.*

[31]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 74-75.

(5) That Union Oil unreasonably and unconscionably delayed the drilling of the demanded protection well;

(6) That Union Oil failed to present justifiable reasons for its failure to drill a protection well;

(7) That Union Oil failed in its duty to seek administrative relief on behalf of Spaeth;

(8) That Union Oil vigorously opposed Spaeth's own efforts to obtain administrative relief, and even opposed Spaeth's standing to obtain such relief;

(9) That Union Oil failed to act as a prudent operator;

(10) That Union Oil declined, for specious reasons, offers by a third party to drill a protection well; and

(11) That Union Oil's actions and inactions toward Spaeth constituted a willful, fraudulent or grossly negligent breach of duties owed to Spaeth.[32]

Each of the above findings, made by the district court as the hearer of facts, remain undisturbed on appeal.

Insofar as concerns Union Oil's implicit contention herein that its obstruction of Spaeth's efforts to obtain administrative relief was in good faith and its explicit statement that the court of appeals "utterly failed" to consider whether Union Oil's opposition to Spaeth's efforts was "well founded" or a "sham", it should be noted that the court of appeals expressly found as follows:

(1) That Union Oil had a duty, which it could not ignore, to seek administrative relief on behalf of Spaeth;

(2) That Union Oil's assertion that its conduct before the Commission was based on reliance on the advice of experts was without merit;

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[32]District Court Memorandum Opinion, Appendix A at 3a-8a.

(3) That there is "nothing in the record to sustain Union's claim of good faith reliance on its experts" and that "[t]he reasonable inferences are all to the contrary"; and

(4) That "[t]he evidence shows a reckless and wanton disregard by Union of Spaeth's rights."[33]

The court of appeals further specifically affirmed that Union Oil *intentionally,* and *for fraudulent reasons,* permitted and caused the drainage of 7.2 billion cubic feet of natural gas from beneath the Spaeth Unit through offsetting wells in which Union Oil owned substantial interests.[34] The action was remanded for a remittitur of punitive damages for reasons irrelevant to the "Question Presented" in this appeal.

In its Order on remand, the district court observed that the jury's verdict for exemplary damages was based upon a jury determination that Union Oil "was permitting drainage to occur under circumstances where it *directly benefited financially* by such drainage."[35] The court of appeals affirmed the district court's judgment on remand, observing that Union Oil's conduct in breaching the implied covenant to protect Spaeth against drainage had been malicious.[36]

PROCEEDINGS BELOW

Union Oil's suggestions that it briefed First Amendment or due process issues to the district court and court of

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[33]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1458-60 (10th Cir. 1983).

[34]*Id.* at 1459-60.

[35]District Court Order on Remand, Appendix B at 11a (emphasis added).

[36]*Spaeth v. Union Oil Co. of California*, 762 F.2d 865, 867 (10th Cir. 1985).

appeals, and that the court of appeals inexplicably ignored and even failed to address such issues, are simply inaccurate. Suffice it to say that Union Oil cited to the court of appeals only the following two Texas intermediate appellate decisions in support of Union Oil's nebulous statement that "Union cannot be held liable for lawfully pursuing its legal remedies": *Smart v. United States Fidelity & Guaranty Co.*[37] and *Scurlock Oil Co. v. Joffroin.*[38] Neither of said two cases involve the exercise of the First Amendment right to petition, and instead respectively concerned actions to cancel a lien filed against real property and to recover for an alleged trespass.

REASONS FOR DENYING THE WRIT

As is reflected in the Corrected Statement of the Case and in the various opinions below of the district court and court of appeals, the result below turns upon the specific facts of this case in the context of the unique legal relationship between the litigants herein — Union Oil's persistent and tortious course of conduct in violation of duties owed to Spaeth, its oil and gas lessor. Spaeth submits that, in view of the relevant facts and applicable Oklahoma law, the present case simply does not present a meritorious question warranting review by this Court on grant of certiorari.

Proposition I

The Writ Should Be Denied Because Union Oil's Liability Arose Due To Its Malicious Course Of Conduct In Breach Of Duties Owing To Spaeth, Not Due To A Simple Act Of "Participating In A State Administrative Proceeding"

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[37]513 S.W.2d 291 (Tex. Civ. App. 1974).

[38]390 S.W.2d 526 (Tex. Civ. App. 1965). Union Oil's Petition at 6, fn. 7. (The two Texas intermediate appellate decisions constitute the "citations omitted" from Union Oil's footnote number 7).

A. Union Oil's Duties To Spaeth As An Oil And Gas Lessee

Under Oklahoma law the standard oil and gas lease imposes upon the lessee an implied covenant to protect the lessor's share of hydrocarbons underlying a leasehold interest from being drained by wells located on neighboring lands.[39] Additionally, as Spaeth's lessee, Union Oil not only assumed a duty to protect Spaeth's interests from being drained, but also *contractually deprived* Spaeth of the right to act on her own behalf to drill wells herself or to obtain others to do so for the purpose of protecting against such drainage.[40]

In order to effectuate and render meaningful the implied covenant to protect against drainage, further duties are imposed upon the lessee to act as a "prudent operator",[41] and to secure to each lessor such lessor's ratable share of production of hydrocarbon's underlying the lessor's leasehold interest.[42] The lessee also "has the duty to seek an [administrative] exception or variance to remove the obstruction to performance of his obligations under the

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[39]*Texas Consolidated Oils v. Vann*, 258 P.2d 679, 687 (Okla. 1953); *Ramsey Petroleum Corp. v. Davis*, 85 P.2d 427, 429 (Okla. 1938); H. WILLIAMS & C. MEYERS, 5 OIL AND GAS LAW § 821 (1980 ed.)

[40]"If the landowner has granted an oil and gas lease, his right to protect himself is impaired, but he has confered upon his lessee his operating rights for the fundamental purpose of developing the leased premises for their mutual profit and advantage. That fundamental purpose requires the lessee to protect the leased premises from drainage where it is necessary to do so in order to serve their mutual profit and advantage." E. KUNTZ, 5 THE LAW OF OIL AND GAS § 61.1 at 136 (1978 ed.).

[41]*Texas Consolidated Oils v. Vann*, 258 P.2d 679, 687 (Okla. 1953).

[42]*Application of Peppers Refining Co.*, 272 P.2d 416, 424 (Okla. 1954).

lease."[43] Finally, and as obtains in any contractual context, Union Oil had an obligation to deal fairly and in good faith with Spaeth.[44] Union Oil's duties to Spaeth in these respects formed the underlying relationship between the parties.

B. The Fraudulent Drainage Of Spaeth's Interests By Union Oil

As mentioned in the Corrected Statement of the Case, *supra*, Union Oil owned substantial interests in the three draining wells offsetting the Spaeth Unit to the east, southeast, and south. Due partially to the fact that Union Oil operated both the well located on the Spaeth Unit and the offsetting well to the east, Union Oil was in a position of superior knowledge insofar as concerned the relevant facts regarding production from the subject wells.[45] As a purely financial proposition, Union Oil stood to gain from the drainage of Spaeth's interests since Union Oil would derive a greater share of the proceeds attributable to such drained production as a result of its greater ownership in the offsetting, draining wells while concurrently avoiding the costs associated with drilling the necessary protection well on Spaeth's land.

By 1968 it had become evident that the offsetting wells in which Union Oil owned an interest were draining the Spaeth Unit. As was observed by the district court in its Memorandum Opinion, "it inheres in the prudent operator rule that, where as here, the lessee is draining his lessors' land, he will make studies and keep abreast of the available information to determine when, or if, further drilling would

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[43]E. KUNTZ, 5 THE LAW OF OIL AND GAS, § 59.1 at 104 (1978 ed.). See *Sinclair Oil & Gas Co. v. Bishop*, 441 P.2d 436, 437 (Okla. 1967).

[44]See *Producers Pipe and Supply Co. v. James*, 332 P.2d 958, 960 (Okla. 1958).

[45]District Court Memorandum Opinion, Appendix A at 6a.

be profitable and prudent."[46] By 1968, therefore, Union Oil had a duty to take affirmative action and drill a well to prevent further drainage of Spaeth's interests. It was shown at trial that Union Oil refrained from taking this action and instead permitted the offset wells in which it owned substantial interests to continue to drain the Spaeth Unit. When a third party offered to contract with Union Oil in 1972 to drill a well on the Spaeth Unit under an arrangement that would not affect Union Oil's interest in the existing well thereon and that would not require the expenditure of any money by Union Oil, Union Oil declined the offer for "specious reasons." By 1976 the three offsetting, draining wells had collectively produced 42 billion cubic feet of gas compared to the 1 billion cubic feet of gas produced from the Spaeth Unit.

Throughout the period of time from 1968 to the commencement of this action in 1979 "Union had a duty, which it could not ignore, to seek administrative relief" from the Commission for permission to drill a second well to prevent the continuing drainage of Spaeth's interests.[47] Union Oil, however, not only failed to satisfy this duty, but continued to drain Spaeth's interests through the adjacent wells in which it owned substantial interests. Spaeth therefore filed her own Application with the Commission, only to be opposed by Union Oil, necessitating a lengthy appeal that ultimately vindicated Spaeth's position as to the necessity of a second, protection well in the Spaeth Unit. Union Oil also ignored Spaeth's demand for the voluntary drilling of a protection well or, in the alternative, for the release of her oil and gas

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[46]*Id.* at 5a (quoting *Dixon v. Anadarko Production Co.*, 505 P.2d 1394, 1396 (Okla. 1973)).

[47]*Spaeth v. Union Oil Co. of California*, 710 P.2d 1455, 1458 (10th Cir. 1983).

lease. By the time Spaeth instituted the present action in 1979, the three offsetting, draining wells in which Union Oil owned substantial interests had collectively produced 57 billion cubic feet of gas compared to 2 billion cubic feet of gas produced from the Spaeth Unit. By the time of trial in March 1981, the evidence established that such offsetting, draining wells had drained the Spaeth Unit of not less than 7.2 billion cubic feet of gas.[48]

The district court, in its opinion and orders in this action, variously characterized Union Oil as acting "unreasonably and unconscionably", as offering "specious" reasons for its acts and omissions, as acting "in breach and disregard of the duties it owed", as being guilty of "a willful, fraudulent or grossly negligent breach of the duty owed to [Spaeth]",[49] as having "permit[ted] drainage to occur under circumstances where it directly benefitted financially by such drainage" and as being guilty of "particularly egregious" conduct.[50] The court of appeals, in its two opinions below, variously characterized Union Oil as having asserted as a defense that it essentially had a "license to drain gas", as having asserted defenses regarding purported good faith in its actions before the Commission that were without merit, as having acted in "reckless and wanton disregard" of Spaeth's rights,[51] and as "maliciously allowing drainage of [Spaeth's] gas."[52] From these findings of the district court and the court of appeals, it can be seen that exemplary damages were not

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[48]*Id.* at 1459.

[49]District Court Memorandum Opinion, Appendix A at 6a-8a.

[50]District Court Order on Remand, Appendix B at 11a-12a.

[51]*Spaeth v. Union Oil of California*, 710 F.2d 1455, 1458-60 (10th Cir. 1983).

[52]*Spaeth v. Union Oil of California*, 762 F.2d 865, 867 (10th Cir. 1985).

assessed against Union Oil for merely "participating in a state administrative proceeding." Rather, the exemplary damages were assessed against Union Oil as a direct result of Union Oil's fraudulent and malicious conduct in draining Spaeth's interests for a period in excess of ten years. Union Oil's obstructive tactics before the Commission were only an incidental, albeit equally malicious, aspect of the actual tort committed.

The result reached below, based upon Union Oil's breach of its duties as an oil and gas lessee in fraudulently draining the Spaeth Unit, was correct, and such result would properly be reached even in the absence of the particular factual circumstance herein of Union Oil's bad faith opposition to Spaeth in the Commission proceeding. The "Question Presented" as framed by Union Oil in its Petition, by which Union Oil attempts to cast its liability herein as resting solely on its participation in the Commission proceeding, is misleading and simply does not arise under the facts of this case, and an examination of that hypothetical question by the Court would not be appropriate. Moreover, the operative facts of this oil and gas case do not raise a constitutional question meriting consideration by this Court. For these reasons, and the further reasons discussed below, Union Oil's Petition should be denied.

Proposition II

The Writ Should Be Denied Because Union Oil's Opposition To Spaeth's Commission Application Was Actuated By Malice And Fraudulent Intent, And Does Not, In Any Event, Enjoy First Amendment Protection

The various findings by the district court and court of appeals established that Union Oil's overall actions in intentionally draining Spaeth's minerals, and in opposing Spaeth's efforts before the Commission in furtherance of that tortious conduct, were fraudulent, and in reckless and

wanton disregard of Spaeth's rights. Under these circumstances, Union Oil could not prevail in its First Amendment privilege claim even if the Court were to reverse established law associated with First Amendment right to petition privileges, and instead were to apply the stringent "actual malice" standard established under *New York Times Co. v. Sullivan*,[53] pertaining to First Amendment freedom of speech and libelous statements directed at public figures.

This Court has previously acknowledged that "baseless litigation is not immunized by the First Amendment right to petition."[54] Union Oil's conduct in opposing Spaeth before the Commission was found to be without merit and in bad faith and to be unsupported by any substantial evidence. Union Oil's conduct in this regard was further found to be in wanton disregard of Spaeth's rights, malicious, and particularly egregious. As such, and particularly in light of the obviously tortious motive underlying Union Oil's conduct, Union Oil's claim of an exercise of the right to petition is without a "reasonable basis", and, in the absence of an absolute immunity, is "not within the scope of the First Amendment protection."[55] Union Oil's invocation of the First Amendment right to petition "may not be used as the means or the pretext for achieving 'substantive evils'."[56]

Spaeth submits that the subject action is not one in which an exercise of the right to petition plays a material role. As this Court has previously observed, "the Petition

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[53]376 U.S. 254, 279-80 (1964).

[54]*Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

[55]*Id.*

[56]*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

Clause does not require the State to expand this privilege to an absolute one."[57] Certainly, the court of appeals' opinions herein are not in conflict with other reported decisions of that, or any other, court, particularly in light of this Court's controlling and recent decisions in *Bill Johnson's Restaurants v. NLRB*,[58] and *McDonald v. Smith*.[59] As was true with regard to other inapposite defenses asserted by Union Oil in the proceedings below, the granting of immunity to Union Oil under the First Amendment right to petition would achieve no other purpose than to give Union Oil a "license to drain gas" from its lessor with impunity.

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[57]See *McDonald v. Smith*, 472 U.S. ____, 105 S.Ct. 2787, 2791, 86 L.Ed.2d 384, 390 (1985).

[58]*Supra*, fn. 54.

[59]*Supra*, fn. 57.

CONCLUSION

In view of the foregoing, further review of this action is unwarranted, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1985

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

NO. CIV-79-345-T

SARAH M. SPAETH,

Plaintiff,

v.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

FILED
MAR 17 1981
HERBERT T. HOPE
CLERK, U.S. DISTRICT COURT
BY_____
DEPUTY

MEMORANDUM OPINION

Plaintiff, Sarah M. Spaeth, commenced this action against the defendant, Union Oil Company of California, seeking actual and punitive damages and equitable relief. Plaintiff alleges that defendant breached implied covenants of an oil and gas lease to protect her mineral estate from drainage and to undertake the prudent development of the leasehold. Plaintiff commenced this action in the District Court in Blaine County, Oklahoma and the action was removed to this Court by the defendant on the basis of diversity of citizenship of the parties. The case was simultaneously tried to a jury and the Court on March 9, 10 and 11, 1981 with the jury determining the question of liability for monetary damages and the Court reserving

the equitable determination of full or partial lease cancellation.[1]

Having heard and considered the evidence, testimony and argument of the respective parties, the Court files this Memorandum Opinion which shall constitute its findings of fact and conclusions of law.

The undisputed facts of this action, as stipulated by the parties hereto, are as follows:

1. Sarah M. Spaeth owned of record the entire mineral interest underlying:

> Lots 1 and 2 and the South Half of the Northeast Quarter of Section 4, Township 17 North, Range 11 West, Blaine County, Oklahoma

until December 29, 1976 and from said date to the present time Sarah M. Spaeth is the owner of an undivided one-half of such minerals.

The mineral interest of Sarah M. Spaeth is subject to that certain oil and gas lease dated October 29, 1956 from Harry J. Gallin to Union Oil Company of California covering the above described land, which lease was recorded December 8, 1956 in Book 38 at page 228. The interest of Sarah M. Spaeth is further subject to that certain contract between Sarah M. Spaeth and Marlin Oil Corporation dated March 17, 1978.

2. By Order No. 61106 of the Oklahoma Corporation Commission, dated December 28, 1965, Section 4-17N-11W, Blaine County, Oklahoma was designated as a single 640-acre drilling and spacing unit for production of gas and gas condensate from the Morrow Sand common source of supply. That under the provisions of said order only one well was permitted upon Section 4 to the Morrow Sand common source of supply.

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[1]The jury returned a verdict in favor of the plaintiff, awarding her actual damages in the sum of $22,807.00 and further assessed punitive damages against the defendant in the sum of $3 million.

3. The only well drilled in and producing from Section 4 is the Union Oil Company of California Schneider No. 1-4 well located in the approximate center of the Northeast Quarter of the Southwest Quarter of said Section 4 and defendant is the operator of said well.

4. The Schneider No. 1-4 well has continuously produced in paying quantities from the Morrow Sand common source of supply since its completion.

5. Defendant is the operator of the Raines Unit Well in Section 3, Township 17 North, Range 11 West, Blaine County Oklahoma, the east off-set well to the Schneider No. 1-4 well.

6. Defendant owns oil and gas leases covering 160 acres or 1/4 of the working interest in Section 4; approximately 317 acres or 1/2 of the working interest in Section 3; 240 acres or 3/8 of the working interest in Section 10; and 160 acres or 1/4 of the working interest in Section 9.

7. By letter dated October 25, 1976, plaintiff made demand upon defendant either to protect the leased premises from drainage by drilling another well in Section 4 within 90 days from the date of said demand letter or to release the plaintiff's oil and gas lease.

8. On February 13, 1975, Ralph L. Harvey filed an application before the Oklahoma Corporation Commission for an order allowing the drilling of an additional well on Section 4 in Cause CD No. 40701. On May 19, 1975, the Corporation Commission's Trial Examiner entered his report recommending that an order issue denying the application.

9. Plaintiff, joined by other royalty owners in Section 4, petitioned the Corporation Commission on January 29, 1976, for an order authorizing an additional well to be drilled within the unit comprised of Section 4.

10. Defendant challenged plaintiff's standing before the Commission to apply for such an order.

11. Defendant resisted plaintiff and her co-applicants on the merits of the application, taking the position that plaintiff's application should be denied.

12. The Corporation Commission denied plaintiff's application.

13. Plaintiff then appealed to the Oklahoma Supreme Court from the adverse decision of the Corporation Commission.

14. Defendant opposed plaintiff in plaintiff's appeal to the Oklahoma Supreme Court.

15. The Oklahoma Supreme Court reversed the Corporation Commission's order and held that the Commission had erred in denying relief to the plaintiff.

16. Defendant attempted to change the Supreme Court's opinion by filing a petition for rehearing.

17. The Supreme Court of Oklahoma denied defendant's petition for rehearing and issued a mandate to the Oklahoma Corporation Commission ordering the Commission to issue an order consistent with the Supreme Court's judgment.

18. The Commission refused to give the defendant the new hearing it requested and issued an order authorizing the drilling of a second well in the unit comprising Section 4.

19. On December 20, 1979, the Corporation Commission finally entered an order allowing the drilling of a second well.

20. The gas produced from Section 4 was sold to Oklahoma Natural Gas Company for the following prices during the periods set forth, as follows:

a. 19 cents per thousand cubic feet from March 1, 1974 to July 1, 1974.

b. 20.1 cents per thousand cubic feet from July 1, 1974 to July 1, 1979.

c. 21.2 cents per thousand cubic feet from July 1, 1979 to January 1, 1981.

21. The defendant's net worth as of September 30, 1980, as shown by its Form 10-Q filed on November 13, 1980 with the Securities and Exchange Commission is approximately three and one-third billion dollars.

22. Union Oil Company of California is now, and has been since the entry of Order No. 161635 on December 20, 1979, willing to drill a well on Section 4 in the event plaintiff abandons her claim that the lease has terminated.

The determination of plaintiff's right to relief falls within the characterization of fraudulent drainage and, as such, constitutes an exception to the reasonable prudent operator test. In *Dixon v. Anadarko Production Company*, 505 P.2d 1394 (Okla. 1973), the Oklahoma Supreme Court held that a petition need not allege the prudent operator rule when, as in this case, the lessee is allegedly draining his lessor's land and the lessee has superior knowledge of the facts. Further, the Court stated "it inheres in the prudent operator rule that, where as here, the lessee is draining his lessors' land, he will make studies and keep abreast of the available information to determine when, or if, further drilling would be profitable and prudent." 505 P.2d at 1396. The Court cited *Crocker v. Humble Oil & Refining Company*, 419 P.2d 265 (Okla. 1966), for the holding that where a lessee, operating a well on adjacent land, is draining his lessor's land, the lessee need only establish a prima facie case of unreasonable or unconscionable delay in developing an oil and gas lease and the burden of proof is then upon the lessee to excuse his delay.

In *Haken v. Harper Oil Company*, 600 P.2d 1227 (Okla. App. 1979), the Oklahoma Court of Appeals applied the holding of the Supreme Court in *Dixon* that because of superior knowledge, the lessee operating a well on adjacent land has the burden of excusing any significant delay in drilling an offset well. See also *Cock v. El Paso Natural Gas Co.*, 560 F.2d 978 (10th Cir. 1977), which involved the application of New Mexico law but which does provide further persuasive authority for the proposition that the reasonable prudent operator rule does not

apply to a case where a lessee has an interest in adjacent property and refuses to protect its lessor from drainage.

At trial, plaintiff's evidence proved (1) that substantial drainage has occurred from plaintiff's land in Section 4 into the adjoining lands in Sections 3, 9 and 10; (2) that the defendant operates a well in Section 3 and has substantial interests in Sections 3, 9 and 10 into which plaintiff's gas is being drained; (3) that plaintiff made demands upon the defendant to develop her lease and protect it from such drainage; (4) at the time of such demands, defendant had superior knowledge of the facts by virtue of its operation of the wells in Section 4 and in Section 3; (5) that the defendant unreasonably and unconsionably delayed the drilling of such additional well, as demanded, and (6) the defendant failed to excuse its delay. The well demanded of defendant by plaintiff would have been prudent and probably profitable to defendant under the test of *Sunray Mid-Continent Oil Co. v. McDaniel*, post, and was necessary to protect plaintiff's property from the drainage that occurred. As the evidence and stipulated facts establish, the defendant not only failed in its duty to develop plaintiff's lease to protect it from drainage and to apply for permission to do so from the Oklahoma Corporation Commission, but also vigorously opposed plaintiff's own efforts to acquire such permission for the drilling of the additional well, both in the Oklahoma Corporation Commission and in the Oklahoma Supreme Court, in which court she prevailed.

Even applying the reasonable prudent operator test, the evidence shows that Union failed to act as a reasonable prudent operator would have acted under similar circumstances.

In *Sunray Mid-Continent Oil Co. v. McDaniel*, 361 P.2d 683 (Okla. 1961), the Oklahoma Supreme Court stated the reasonable purdent operator rule as follows:

> "*There is no implied obligation on the part of an oil and gas lessee to drill an offset well to a well on adjoining premises, or to drill an additional well on the leased premises after oil or gas has been discovered thereon, save*

> *and except where the drilling of such well would probably, taking all of the existing facts and circumstances into consideration, produce sufficient oil to repay the cost of drilling, equipping, and operating such well, and also to produce a reasonable profit on the entire outlay,* and neither the lessee nor the lessor is the arbiter of whether an offset well should be drilled or the leased premises further developed, *but both are bound by what a reasonably prudent operator would do under similar circumstances*, and under no circumstances will a lessee be required to drill an offset or an additional well when the same would probably not result profitably to him." 361 P.2d at 685 citing *Wilcox v. Ryndak*, 49 P.2d 733 (Okla. 1935).

In consideration of the foregoing factors, the evidence established that Union was obliged to undertake the drilling of the additional well, on its own, as a reasonable prudent operator. It, of course, did not do so, and even declined, for specious reasons, offers by Marlin Oil Corporation, inter alia, to drill the well at Marlin's risk and expense on a farmout basis, with Union reserving an interest in such well, and without affecting Union's interest in the existing Schneider 1-4 well.

Under all such circumstances, and upon the application of either of the foregoing tests, it is the finding of this Court that the described actions and inactions of Union Oil Company were in breach and disregard of the duties it owed to Sarah M. Spaeth to protect her mineral estate from drainage and to fully develop that mineral estate. There remains for determination, however, the question of whether lease cancellation, partial or entire, is an appropriate remedy in this case. In each of the cases cited above, cancellation of an oil and gas lease for breach of an implied covenant was a consideration present. Indeed, the Oklahoma courts have long recognized cancellation of an oil and gas lease as an appropriate remedy for the lessee's breach of the duty to operate the lease diligently and to fully develop the lease. *Strange v. Hicks*, 188 P. 347 (Okla. 1920); *Pelham Petroleum Co. v. North*, 188 P. 1069 (Okla. 1920); *Carder v.*

Blackwell Oil & Gas Co., 201 P. 252 (Okla. 1921); *Wapa Oil & Development Co. v. McBride*, 201 P. 984 (Okla. 1921); *Junction Oil & Gas Co. v. Pratt*, 225 P. 717 (Okla. 1924); *Mistletoe Oil & Gas Co. v. Revelle*, 245 P. 620 (Okla. 1926); *Scott v. Price*, 247 P. 103 (Okla. 1926); *Patsy Oil & Gas Co. v. Baker*, 259 P. 864 (Okla. 1927); *Worrell v. Parsons*, 271 P. 155 (Okla. 1928); *Robinson v. Miracle*, 293 P. 211 (Okla. 1930); *Indian Territory Illuminating Oil Co. v. Haynes Drilling Co.*, 69 P.2d 624 (Okla. 1937), *cert. denied*, 302 U.S. 736 (1937); *Ramsey Petroleum Corp. v. Davis*, 85 P.2d 427 (Okla. 1939); *Magnolia Petroleum Co. v. Rockhold*, 138 P.2d 809 (Okla. 1943); *Morrison v. Johnson*, 185 P.2d 208 (Okla. 1947); *Hudson v. Lyons*, 186 P.2d 309 (Okla. 1947); *Bain v. Portable Drilling Corp.*, 198 P.2d 207 (Okla. 1948); *Shell Oil Co. v. Howell*, 258 P.2d 661 (Okla. 1953); *Shell Oil Co. v. Lee*, 258 P.2d 666 (Okla. 1953); *Coal Oil & Gas Co. v. Styron*, 303 P.2d 965 (Okla. 1956); *Barnes v. Mack Oil Co.*, 376 P.2d 279 (Okla. 1962); *Union Oil Co. of California v. Jackson*, 489 P.2d 1073 (Okla. 1971). While each of these cases indicates cancellation or partial cancellation of a lease is an available remedy, they also expressly hold that the remedy of lease cancellation is only to be used if, under all of the circumstances of a particular case, equity and justice as between the parties demands the application of such relief. See also *Stewart v. Amerada Hess Corp.*, 604 P.2d 884 (Okla. 1979). After giving careful examination of all of the evidence produced by the parties hereto, and the arguments of counsel, it is the determination of the Court that Union Oil Company's actions and inactions toward the plaintiff were either a willful, fraudulent or grossly negligent breach of the duty owed to her. Accordingly, plaintiff is entitled to partial cancellation of such lease. It is the conclusion of the Court that judgment should be entered cancelling the lease in Section 4, as above more fully described, through which Union Oil Company of California is the lessee of the mineral estate owned by Sarah M. Spaeth, save and except that portion of the leasehold which has been properly developed through the Schneider 1-4 well.

Judgment shall enter accordingly.

DATED this 17th day of Marcn, 1981.

/s/ Ralph G. Thompson

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

NO. CIV-79-345-T

SARAH M. SPAETH,

Plaintiff,

v.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

FILED
APR 25 1984
HERBERT T. HOPE
CLERK, U.S. DISTRICT COURT
BY_____
DEPUTY

ORDER

This action is before the Court on remand from the United States Court of Appeals for the Tenth Circuit with directions (1) to enter a judgment for the plaintiff and against the defendant in the amount of $17,542 for actual damages, (2) to set aside and vacate the award of punitive damages, (3) to order a remittitur of a substantial amount in punitive damages with due consideration to the amount needed to punish the defendant in the particular circumstances presented, and (4) if the plaintiff does not accept the remittitur, to hold a jury trial solely on the amount of punitive damages.

As the Court of Appeals noted, when the jury awarded plaintiff punitive damages of three million dollars, it was un-

aware that the Court would later order a partial cancellation of the lease held by the defendant.

Title 23, Okla. Stat. 1981 § 9 provides that punitive damages may be awarded for the sake of example or by way of punishment. The punishment value of an award of punitive damages varies from case to case. *Cities Service Oil Co. v. Merritt*, 332 P.2d 677 (Okla. 1958); *Jones v. Lennington*, 629 P.2d 805 (Okla. App. 1981). The determination is essentially the amount needed to punish in the circumstances presented.

In the case at hand, the jury determined that an award of punitive damages in the amount of $3 million was justified where the operator of a gas well was permitting drainage to occur under circumstances where it directly benefitted financially by such drainage. This Court cancelled the defendant's right to further develop the leasehold estate held by it in view of the defendant's refusal to engage in such further development.

There is no evidence in the record presented at trial that would permit this Court to determine the value to the defendant of the leasehold estate that was cancelled by the Court. However, it does not appear to this Court that the intention of the Court of Appeals was to offset the punitive damages awarded by the jury on a dollar for dollar basis for the value of the cancelled lease. Rather, it appears as though the Court of Appeals intended for this Court to consider all of the circumstances presented, including the cancellation of the lease, and evaluate the amount of punitive damages that are needed to punish the defendant.

The Court has considered the record presented at trial, including the relative economic positions possessed by the plaintiff and the defendant, the fact that the plaintiff was assisted in this litigation by another, the fact that the defendant asserted as a defense that it essentially held a "license to drain gas," (Opinion of the Circuit Court, p.6), the fact that the defendant offered no explanation prior to the commencement of this action for its failure to fully develop the leasehold estate

held by it, and the fact that the defendant's leasehold estate has been cancelled in part and it is now subject to an award of punitive damages. Upon consideration of these factors, and the record as a whole, this Court finds that the defendant's actions toward the plaintiff were particularly egregious and a substantial award of punitive damages is warranted so as to impress upon the defendant a responsibility to deal fairly with its royalty interest holders. Accordingly, the plaintiff is hereby directed to remit one million dollars of the punitive damages awarded by the jury within fifteen days hereof. If plaintiff so files a remittitur, judgment shall be entered herein for the amount of $17,542 actual damages an $2,000,000 punitive damages in addition to the partial lease cancellation. If such a remittitur is not filed, defendant will be granted a new trial upon the sole issue of punitive damages.

IT IS SO ORDERED this 25th day of April, 1984.

/s/ Ralph G. Thompson

UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPREME COURT OF OKLAHOMA
May 8, 1979
As Corrected July 9, 1979
Rehearing Denied July 20, 1979

No. 49954

SARAH M. SPAETH, WILLIAM KELLY CRONKHITE, WINNIE MAY HOWELL and WALTER SCHNEIDER,

Appellants,

v.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, UNION OIL COMPANY OF CALIFORNIA, ASHLAND OIL, INC. and GETTY OIL COMPANY,

Appellees.

Mineral owners filed application with Corporation Commission seeking modification of previous order creating drilling and spacing units within common source of supply to permit drilling of additional well and protect owners from drainage and consequent prejudice of their correlative rights. The Commission denied the application and the owners appealed. The Supreme Court, Irwin, V. C. J., held that: (1) owners of interest in minerals affected by Commission's order had standing to seek permit to drill additional wells; (2) there was no substantial evidence to support Commission's finding that there had not been substantial change of conditions or substantial change of knowledge of conditions since previous spacing order or that there had been no violation of correlative rights of applicants or of owners of oil and gas rights in and under the unit in question, and (3) Supreme Court did not have authority to make the order which the Commission should have made and could only reverse the Commission's order.

Reversed.

Doolin, J., concurred in part and dissented in part and filed opinion in which Hodges and Barnes, JJ., joined.

Appeal from the Corporation Commission of the State of Oklahoma.

Appellants sought an order which would have permitted the drilling of an additional well on a drilling and spacing unit established by the Corporation Commission. Appellants were denied relief and they appealed.

ORDER REVERSED.

Robert J. Emery, Lytle, Soulé & Emery, Oklahoma City, for appellants.

H.B. Watson, Jr., Watson, McKenzie & Moricoli, Oklahoma City, for appellee Union Oil Co. of California.

C. Harold Thweatt, Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, for appellees Ashland Oil, Inc. and Getty Oil Co.

IRWIN, Vice Chief Justice.

Appellants, Sarah M. Spaeth and various other mineral owners, filed an application with the Corporation Commission for a modification of a previous order creating 640 acre drilling and spacing units within the common source of supply to permit the drilling of an additional well to protect appellants from drainage and consequent prejudice of their correlative rights.[1] Union Oil Company, the well operator in the affected drilling and spacing unit, Ashland Oil Company, Inc., and Getty Oil Company, adjoining operators, intervened as contestants to the application. By Order No. 122,300, Commission denied appellants' requested modification, and they appealed.

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[1]Appellants sought authority to drill an additional well on the drilling and spacing unit and did not seek two allowables, but only a single allowable.

Union first contends that appellants had no standing to request the modification. 52 O.S. 1971, § 87.1(a) authorizes the Commission to enter an order after hearing upon petition of any person owning an interest in minerals embraced within the common source of supply or the right to drill upon lands embraced within the common source of supply. *Texas Oil and Gas Corporation v. Rein*, Okl., 534 P.2d 1277 (1975). Also, 52 O.S. 1971, § 112, provides in part:

> "Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify or supplement the same * * *."

Appellants not only owned an interest in the minerals involved but had been affected by the Comission's order establishing the drilling unit in the common source of supply. We hold appellants had standing to seek the relief requested. Whether they are entitled to any relief is an entirely different matter.

The record discloses a common source of supply for natural gas in the Morrow formation, underlying part of Township 17, Range 11 West, Blaine County, Oklahoma. By Order No. 59,245, entered June 17, 1965, the Commission created 640 acre drilling and spacing units for the Morrow underlying Sections 10 through 15 and 22 through 24 of Township 17. This order was entered on the strength of information obtained from a producing well drilled in Section 14. By Order No. 61,106, entered December 28, 1965, the Commission extended Order No. 59,245 to include Sections 1 through 5, 8, 9, 16, 17, 20, 21, and 25 through 29 of Township 17. Evidently, Order No. 61,106 was entered on the strength of information obtained from the well in Section 14 as there was no additional development in the area between the June and December order.

In 1966 and 1967 wells were drilled and completed in Sections 3, 4, 9 and 10. Appellants are mineral owners of acreage underlying Section 4. The well in Section 4 is, relatively speaking, a poor well. Testimony on behalf of appellants was that

past production and potential future recovery from adjoining wells east, southeast and south of Section 4 was and would continue to be many times greater than in Section 4. Appellants' expert believed that porosity factors are such in the common source of supply that these better producing wells have been and will continue to drain gas from under Section 4. That testimony was based on data resulting from the four wells drilled since the last order.

The Commission, in denying appellants' application for modification, made the following findings:

> "6. That the evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of conditions since Order No. 61,106 was entered. * * * The evidence fails to establish the violation of the correlative rights of the applicants or of the owners of the oil and gas rights in and under the unit in question * * *."

A spacing order which has become final may be modified only upon substantial evidence which shows a change in conditions, or a change in knowledge of conditions, arising since the last order. *Phillips Petroleum Co. v. Corporation Commission*, Okl., 461 P.2d 597 (1969). As in other Commission proceedings, the substantial evidence rule controls in appeals involving oil and gas conservation orders. *French v. Champlin Exploration, Inc.*, Okl., 534 P.2d 1302 (1975). This Court had no numerous occasions repeated the definition of "substantial evidence". See *Central Oklahoma Freight Lines v. Corporation Commission*, Okl., 484 P.2d 877 (1971).

Virtually all of the evidence before the Commission was presented by appellants. Based upon data obtained as a result of the wells in Sections 3, 4, 9 and 10, their expert testified that the wells in Sections 3, 9 and 10 were draining Section 4. He said that we now have information involving the reservoir that we did not have when the first orders were entered; and that the changes in knowledge and conditions are substantial changes. This expert was of the opinion that the well in Section

4 was not capable of protecting Section 4 from drainage from the wells in Sections 3, 9 and 10. In order to stop the drainage, he was of the opinion an additional well had to be drilled in Section 4. The expert's opinion was supported by technical data. Appellees offered no expert testimony but did cross-examine appellants' witness on all matters. Notwithstanding this lengthy questioning, appellants' expert testimony remained consistent. We can only conclude there is no substantial evidence that will support Commission's finding that the "evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of conditions" since the previous spacing order, and its finding that "the evidence fails to establish the violation of the correlative rights of the applicants or of the owners of the oil and gas rights in and under the unit in question." Appellants are entitled to a reversal of the Commission's order.

Appellants suggest that under 52 O.S. 1971, § 112, this Court on appeal, "may itself make the order which the Commission should have made". Section 112 was enacted in 1933 and at that time the Supreme Court had "jurisdiction to review, reverse, correct or annul any action of Commission within the scope of its authority * *." See Oklahoma Constitution, 1931, § 13605. Section 13605 was amended in 1941, and Article 9, § 20 of the Oklahoma Constitution now provides that the Supreme Court "shall enter judgment, either affirming or reversing the order of the Commission appealed from."

Order reversed.

LAVENDER, C.J., and WILLIAMS, HODGES, BARNES, SIMMS, HARGRAVE and OPALA, JJ., concur.

DOOLIN, J., concurs in part, and dissents in part.

DOOLIN, Justice, concurring in part, dissenting in part.

I concur with the majority in its holding appellants have standing to request a modification of the involved order. I also concur there is no substantial evidence to support Commis-

sion's order. But, I cannot let the obiter dicta in the final paragraph of the majority's opinion go unchallenged.

Article 9 § 20 of the Constitution of the State of Oklahoma does not indeed state that the Supreme Court on appeal "shall enter judgment, either affirming or reversing the order of the Commission appealed from." I cannot agree this proviso does not permit this court to include, in our reversal, an order of remand or modification.

The Legislature must function within constitutional limitations, and it is presumed that it acts with a conscious regard thereof. Thus in interpreting Art. 9 § 20, legislative construction is highly persuasive.[1]

Not too long ago 52 O.S. 1971 § 113 was enacted by our Legislature. This statute provides in pertinent part, reference certain appeals from the Corporation Commission:

> " . . .
>
> On such appeal the Supreme Court shall have power to determine the validity, the reasonableness and justice of such order, rule or regulation, and should the Court find from the record that the order, rule, or regulation appealed from is incorrect, unreasonable, unjust or insufficient in any particular *it shall amend, modify, or supplement such order*, rule, or regulation so as to make the same correct, reasonable, just or sufficient, or *shall substitute therefor such order*, rule, or regulation as in the Court's opinion is warranted by the record, is reasonable and just, and will effect the purposes and intent of Sections 84–135 of this Title. On such appeals no order, rule or regulation shall be reversed and remanded to the Commission for a new trial thereon or for the taking of additional testimony unless the Court shall find that the evidence introduced before the Commission is insufficient to enable the Court to determine and make a proper order,

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[1] *State v. Grand River Dam Authority*, 195 Okl. 8, 154 P.2d 946 (1945).

> rule, or regulation or that the party appealing did not have lawful notice of the hearing before the Commission, or that the Commission refused to receive competent evidence offered by the party appealing, which, if true, would leave the order, rule, or regulation appealed from without substantial basis in fact.
>
> . . ." (Emphasis supplied).

We must presume our Legislature in enacting this statute was aware of Art. 9 § 20 and construed it to allow the type review by this court provided for in the statute:

Further § 112 is even more explicit:

> Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify, or supplement the same. Such application shall be in writing and shall be heard as expeditiously as possible after notice of the hearing thereon shall have been given in the manner provided by Section 14 of this Act. An appeal shall lie to the Supreme Court from any order made by the Commission in any such proceedings or from the refusal of the Commission to make any order petitioned for therein, in the same manner and within the same time in which other appeals are authorized to be taken by the provisions of this Act, and, on any such appeal, the Supreme Court may affirm the order of the Commission, or the Commission's action in refusing to make the order petitioned for, *or may itself make the order which the Commission should have made*, or remand the cause to the Commission with directions to make such order as the Supreme Court may determine should have been made." (Emphasis supplied).

Although Art. 9 § 20 became law after § 112 was enacted, § 112 has not been repealed. Further repeal by implication is not favored and an earlier statute will not be repealed unless there is irreconcilable conflict.[2] In my opinion Art. 9 § 20 was

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[2]*Gulf Oil Co. v. Woodson*, 505 P.2d 484 (Okl. 1972).

not intended to repeal § 112 nor do they conflict. Neither do I believe § 113 violates Art. 9 § 20. The power of this Court to reverse and remand a decision of the Corporation Commission encompasses the right to modify said order and make it that which Commission should have made.

I am authorized to state that Justice Hodges and Justice Barnes concur in the views herein expressed.

Supreme Court, U.S.
FILED
NOV 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-550

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
v.
SARAH M. SPAETH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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November 7, 1985

BEST AVAILABLE COPY

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REPLY BRIEF OF PETITIONER

The court of appeals in this case upheld the award of $2 million in punitive damages against petitioner Union based in substantial part on Union's participation in a state administrative proceeding. In her opposition to Union's petition for writ of certiorari, respondent does not dispute that the First Amendment gives some protection to participation in state administrative proceedings. Instead, respondent asserts that the award of punitive damages was not based upon Union's conduct before the State Corporation Commission alone and that such conduct was outside the general protection of the First Amendment because taken in "bad faith."

The first claim is entirely beside the point; the second is without any support in the record.

I. UNION'S PUNISHMENT WAS BASED IN SUBSTANTIAL PART ON ITS PARTICIPATION BEFORE THE STATE CORPORATION COMMISSION.

Throughout the proceedings below, respondent made Union's participation before the State Corporation Commission and in the subsequent appeal to the Oklahoma State Supreme Court a centerpiece of her claim that Union should be punished. Respondent now asserts that such participation was merely "an incidental, albeit equally malicious, aspect of the actual tort committed." Opposition at 18. But respondent's success in emphasizing the administrative proceeding has made it impossible at this late stage to deny the central role that such emphasis played in obtaining $2 million in punitive damages in a case where actual damages were a mere $17,542.

As we pointed out in the petition (p. 7, n. 10), the court of appeals made "clear that the fact of Union's participation in the Commission proceedings was a substantial factor in the award of punitive damages." Indeed, the portion of the court's opinion that we quoted there, and now quote in full below, gives Union's participation equal billing with drainage as the basis for affirming the $2 million punitive award on remittitur.[1] Union's appearance before the State Corporation

[1] Thus the court of appeals said (Pet. App. at 4a):

> "The defendant's conduct in maliciously allowing drainage of plaintiff's gas *and in opposing her attempts to obtain relief*, together with its net worth of three and one-third billion dollars, must be considered along with the injury inflicted, breach of an oil and gas lease implied covenant to protect against drainage. The trial court felt that the conduct of the defendant was so egregious that an award of Two Million Dollars in punitive damages was justified and necessary to punish the defendant. R. Vol. IX pp. 612-613. We cannot say that the trial court abused its discretion." (Emphasis added.)

Commission also figured prominently in the court of appeals recitation of the facts that it asserted showed a "reckless and wanton disregard by Union of Spaeth's rights" in its prior decision remanding the case for a remittitur with respect to the punitive damages. *Id.* at 7a, 12a. Counsel for respondent repeatedly emphasized each detail of Union's appearances before the Commission and state Supreme Court throughout the trial and closing argument to the jury. And even the district court memorandum with respect to respondent's equitable claim for lease cancellation (on which respondent places such great emphasis) expressly relies upon the fact that Union "vigorously opposed plaintiff's own efforts to acquire such permission for the drilling of the additional well, both in the Oklahoma Corporation Commission and in the Oklahoma Supreme Court, in which court she prevailed." [2]

Union does not and need not deny that factors other than its appearance in state administrative and judicial proceedings may have played some unspecified role in the award of punitive damages against it. The facts as presented in Union's petition, however, show that such appearances at the very least played a large part in that

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[2] Contrary to respondent's implication (Opp. at 4), the memorandum of the district court of March 17, 1981 (printed as App. A of the Opposition) did not set "forth the express findings of fact and conclusions of law of the district court" with respect to the punitive damages issue presented by this case. Instead, that memorandum set forth the district court's findings of fact and conclusions of law with respect to the issue of lease cancellation alone, which is not in issue here.

The punitive damages which are in issue here were awarded by the jury and are reflected in the final judgments of the district court initially and on the remittitur which are printed as Appendices C and D of the petition pursuant to Rule 21.1.(k). Those judgments expressly mention the memoranda which respondent has printed as Appendices A and B of her Opposition.

award. Nothing in respondent's arguments shows anything to the contrary. The fact that a party was severely punished in substantial part because of its exercise of First Amendment rights is no less unconstitutional than punishment exclusively for such reasons. Indeed, a general verdict (such as here) cannot stand where one of the possible alternative grounds supporting it is unconstitutional even if the same result could have been reached without violating the Constitution.[3]

II. NOTHING IN THE RECORD SUPPORTS RESPONDENT'S CLAIM THAT UNION'S PARTICIPATION BEFORE THE COMMISSION WAS IN BAD FAITH.

Respondent also asserts that "Union Oil's conduct in opposing Spaeth before the Commission was found to be without merit and in bad faith and to be unsupported by any substantial evidence." Opp. at 19. Respondent does not identify the tribunal that made any such finding, much less give any citation to the decision. Insofar as respondent is referring to the fact that the position that Union supported before the Corporation Commission ultimately was rejected by the Oklahoma Supreme Court, she is correct that it was ruled to be "without merit" just the way that any losing cause can be said so to have been found. But surely the First Amendment protection for the right of petition is not restricted to the winning side. Rather, as respondent herself apparently recognizes, to fall outside First Amendment protection parties such as Union would have to be found to have engaged in "baseless litigation"—a claim that here is unsupportable on its face, given the fact that Union actually prevailed before the Commission in the first instance.

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[3] *See Williams v. North Carolina*, 317 U.S. 287, 292 (1942).

CONCLUSION

For the foregoing reasons, together with those presented in Union's Petition for Certiorari, this Court should grant certiorari to review the decision of the U.S. Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

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November 7, 1985